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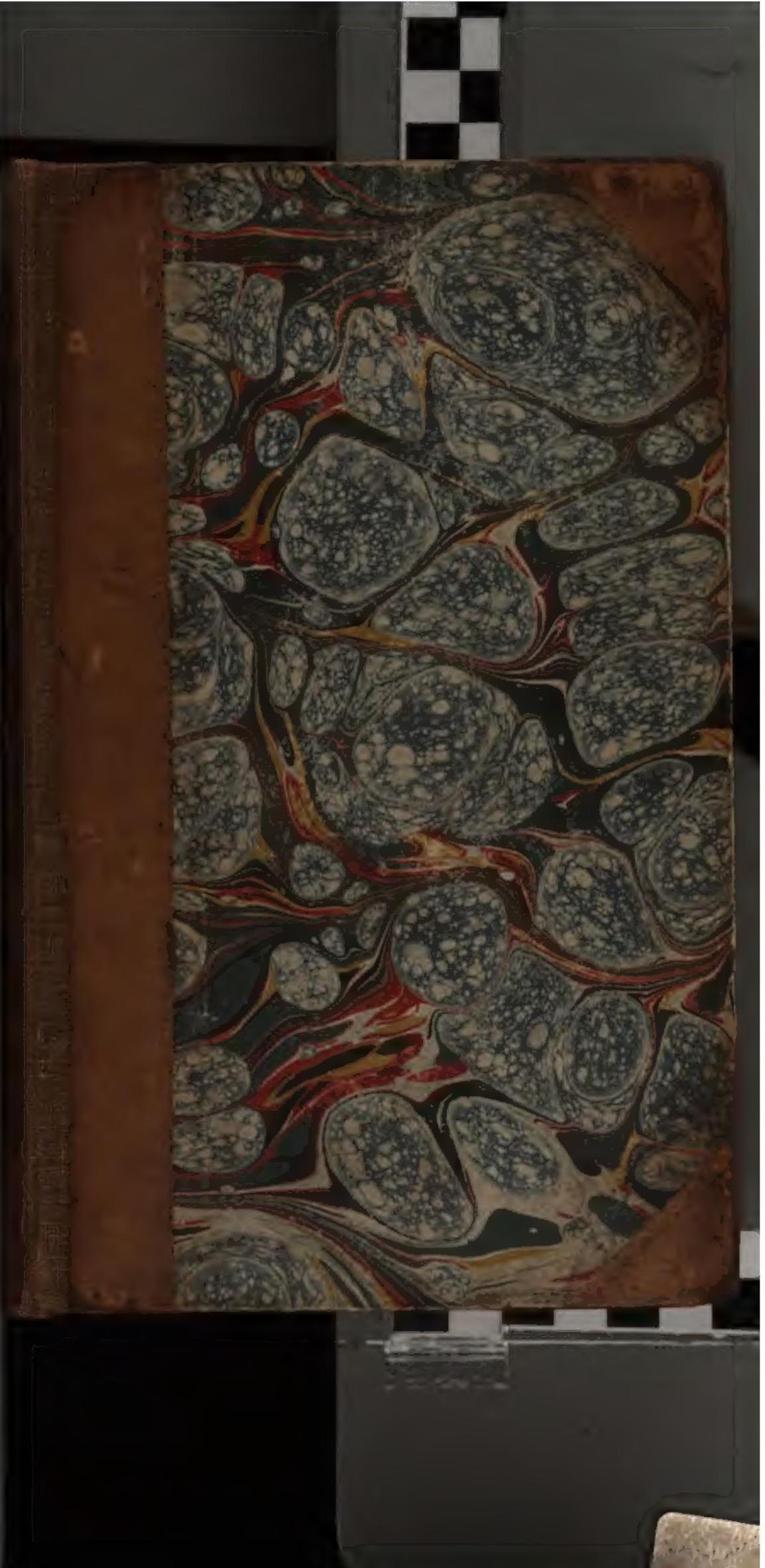
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**LONDON:**

**PRINTED BY C. H. REYNELL, BROAD STREET, COVENT GARDEN.**

**RATIONALE** *J. 1828*

OF

**JUDICIAL EVIDENCE,**

SPECIALLY APPLIED TO

**English Practice.**

FROM THE MANUSCRIPTS OF

**JEREMY BENTHAM, Esq.**

BENCHER OF LINCOLN'S INN.

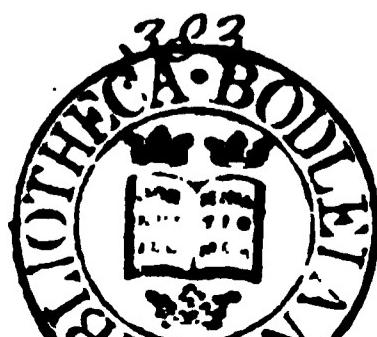
IN FIVE VOLUMES.

I.

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## P R E F A C E.

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THE papers, from which the work now submitted to the public has been extracted, were written by Mr Bentham at various times, from the year 1802 to 1812. They comprise a very minute exposition of his views on all the branches of the great subject of Judicial Evidence, intermixed with criticisms on the Law of Evidence as it is established in this country, and with incidental remarks on the state of that branch of law in most of the continental systems of jurisprudence.

Mr Bentham's speculations on Judicial Evidence have already been given to the world, in a more condensed form, by M. Dumont, of Geneva, in the "Traité des Preuves Judici-

aires," published in 1823: one of the most interesting among the important works founded on Mr Bentham's manuscripts, with which that "first of translators and *redacteurs*," as he has justly been termed, has enriched the library of the continental jurist. The strictures, however, on English law, which compose more than one-half of the present work, were judiciously omitted by M. Dumont, as not sufficiently interesting to a continental reader to compensate for the very considerable space which they would have occupied. To an English reader—to him at least who loves his country sufficiently well to desire that what is defective in her institutions should be amended, and, in order to its being amended, should be known—these criticisms will not be the least interesting portion of the work. As is usual in the critical and controversial part of Mr Bentham's writings, the manner is forcible and perspicuous. The occasional obscurity, of which his style is accused, but which in reality is almost confined to the more intricate of the theoretical discussions, is the less to be regretted, as the nature

of the subject is of itself sufficient to render the work a sealed letter to those who read merely for amusement. They who really desire to possess useful knowledge do not grudge the trouble necessary to acquire it.

The task of the Editor has chiefly consisted in collating the manuscripts. Mr Bentham had gone over the whole of the field several times, at intervals of some length from one another, with little reference on each occasion to what he had written on the subject at the former times. Hence, it was often found that the same topic had been treated two and even three times; and it became necessary for the Editor to determine, not only which of the manuscripts should supply the basis of the chapter, but likewise how great a portion of each of those which were laid aside might usefully be incorporated with that which was retained. The more recent of the manuscripts has in most cases been adopted as the ground-work, being generally that in which the subjects were treated most comprehensively and systematically; while the

earlier ones often contained thoughts and illustrations of considerable value, with passages, and sometimes whole pages, written with great spirit and pungency. Where these could conveniently be substituted for the corresponding passages in the manuscript chosen as the basis of the work, the substitution has been made. Where this was thought inexpedient, either on account of the merit of the passages which would thus have been superseded, or because their omission would have broken the thread of the discussion, the Editor (not thinking himself justified in suppressing anything which appeared to him to be valuable in the original) has *added* the passage which was first written, instead of *substituting* it for that which was composed more recently. From this cause it may occasionally be found in perusing the work, that the same ideas have been introduced more than once, in different dresses. But the Editor hopes that this will never prove to be the case, except where either the merit of both passages, or the manner in which one of them was interwoven

with the matter preceding and following it, constituted a sufficient motive for retaining both.

The plan of the work having been altered and enlarged at different times, and having ultimately extended to a much wider range of subjects than were included in the original design, it has not unfrequently happened that the same subject has been discussed incidentally in one book, which was afterwards treated directly in another. In some of these cases the incidental discussion has been omitted, as being no longer necessary; but in others it contained important matter, which was not to be found in the direct and more methodical one, and which, from the plan on which the latter was composed, it was not found possible to introduce in it. In such cases both discussions have usually been retained.

The work, as has been already observed, not having been written consecutively, but part at one time, and part at another, and having always been regarded by the author as an unfinished work, it has sometimes, (though but rarely) occurred, that while one

topic was treated several times over, another, of perhaps equal importance, was not treated at all. Such deficiencies it was the wish of Mr Bentham that the Editor should endeavour to supply. In compliance with this wish, some cases of the exclusion of evidence in English law, which were not noticed by Mr Bentham, have been stated and commented upon in the last chapter of the book on Makeshift Evidence, and in two chapters of the sixth part of the Book on Exclusion.\* He has likewise subjoined to some of the chapters in the latter book, a vindication of the doctrines which they contain, against the strictures of an able writer in the Edinburgh Review. A few miscellaneous notes are scattered here and there, but sparingly: nor could anything, except the distinctly expressed wish of the Author, have

\* The Editor has not thought it necessary to consult, on the state of the existing law, any other authorities than the compilations of Phillipps, Starkie, and others. These works were sufficiently authoritative for his purpose; and if the state of the law be such, that even those experienced lawyers can have misunderstood it, this simple fact proves more against the law than any remarks which the Editor can have grounded on the misconception.

induced the Editor to think that any additions of his could enhance the value of a work on such a subject, and from such a hand.

For the distribution of the work in Chapters and Sections, the editor alone is responsible. The division into Books is all that belongs to the author.

The original manuscripts contained, under the title of Causes of the Exclusion of Evidence, a treatise on the principal defects of the English system of Technical Procedure. This extensive subject may appear not to be so intimately connected with the more limited design of a work which professes to treat of Judicial Evidence only, as to entitle a dissertation upon it to a place in these pages. On examination, however, the parenthetical treatise was thought to be not only so instructive, but so full of point and vivacity, that its publication could not but be acceptable to the readers of the present work: and the additional bulk, in a work which already extended beyond four volumes, was not deemed a preponderant objection, especially as the dissertation, from the liveliness and poignancy with which it exposes established absurd-

ities, gives in some degree a relief to the comparative abstruseness of some other parts of the work. It stands as the eighth in order of the ten books into which the work is divided.

A few of the vices in the detail of English law, which are complained of both in this book and in other parts of the work, have been either wholly or partially remedied by Mr Peel's recent law reforms; and some others may be expected to be removed, if the recommendations of the late Chancery Commission be carried into execution. The changes, however, which will thus be effected in a system of procedure founded altogether upon wrong principles, will not be sufficient to render that system materially better; in some cases, perhaps, they will even tend to render it worse: since the *mala fide* suitor has always several modes of distressing his adversary by needless delay or expense, and these petty reforms take away at most one or two, but leave it open to him to have recourse to others, which, though perhaps more troublesome to himself, may be even more burdensome to his *bona fide* adversary than the former. Thus, for instance: in one of the earlier chap-

ters of Book VIII, the reader will find an exposure of one of those contrivances for making delay which were formerly within the power of the dishonest suitor; I mean that of groundless writs of error. Mr Peel has partially (and *but* partially) taken away this resource, and the consequence, as we are informed, has been, not that improper delay has not been obtained, but that it has been obtained by way of demurrer, or by joining issue and proceeding to trial; either of which expedients (though perhaps somewhat less efficacious to the party seeking delay) are equally, if not more, oppressive in the shape of expense to the party against whom they are employed, than the proceedings in error.

The truth is, that, bad as the English system of jurisprudence is, its parts harmonize tolerably well together; and if one part, however bad, be taken away, while another part is left standing, the arrangement which is substituted for it may, for the time, do more harm by its imperfect adaptation to the remainder of the old system, than the removal of the abuse can do good. The objection so often urged by

lawyers as an argument against reforms, “ That in so complicated and intricate a system of jurisprudence as ours, no one can foretell what the consequences of the slightest innovation may be,” is perfectly correct; although the inference to be drawn from it is not, as they would have it to be understood, that the system ought not to be reformed, but that it ought to be reformed thoroughly, and on a comprehensive plan; not piecemeal, but at once. There are numerous cases in which a gradual change is preferable to a sudden one; because its immediate consequences can be more distinctly foreseen. But in this case, the consequences even of a sudden change can be much more easily foreseen than those of a gradual one. Whatever difficulties men might at first experience (though the difficulties which they would experience have been infinitely exaggerated) in adapting their conduct to a system of procedure entirely founded on rational, and therefore on new, principles; none are more ready than lawyers themselves to admit that still greater difficulty would be felt in adapting it to a system partly rational and partly technical.

For such a thorough reform, or rather re-construction of our laws, the public mind is not yet entirely prepared. But it is rapidly advancing to such a state of preparation. It is now no longer considered as a mark of disaffection towards the state, and hostility to social order and to law in general, to express an opinion that the existing law is defective, and requires a radical reform. Thus much Mr Peel's attempts have already done for the best interests of his country; and they will in time do much more. A new spirit is rising in the profession itself. Of this the recent work of Mr Humphreys, obtaining, as it has done, so great circulation and celebrity, is one of the most gratifying indications. The reform which he contemplates in one of the most difficult, as well as important branches of the law, is no timid and trifling attempt to compromise with the evil, but goes to the root at once.\* And the rapidity with which this spirit is spreading

\* It may not be impertinent here to remark, that the suggestions of Mr Humphreys, admirable as they are, have received most valuable improvements from Mr Bentham's pen.—See an article in the *Westminster Review*, No. XII.

among the young and rising lawyers, notwithstanding the degree in which their pecuniary interest must be affected by the removal of the abuses, is one of the most cheering signs of the times, and goes far to shew, that the tenacity with which the profession has usually clung to the worst parts of existing systems, was owing not wholly to those sinister interests which Mr Bentham has so instructively expounded, but, in part at least, to the extreme difficulty which a mind conversant only with one set of securities feels in conceiving that society can possibly be held together by any other.

It has appeared to the Editor superfluous to add one word in recommendation of the work. The vast importance of the subject, which is obvious to all men, and the consideration that it has now for the first time been treated philosophically, and by such a master, contain in themselves so many incitements of curiosity to every liberal mind, to every mind which regards knowledge on important subjects as an object of desire, that volumes might be written without adding to their force.

JOHN S. MILL.

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## **PROSPECTIVE VIEW.**

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**BEFORE** entering on the perusal of the following work, it may afford some satisfaction to the reader to understand, from a general intimation, the nature and extent of the information which he may expect from it.

The results may be comprised in three propositions : the one, a theorem to be proved ; the other two, problems to be solved.

The theorem is this : that, merely with a view to rectitude of decision, to the avoidance of the mischiefs attached to undue decision, no species of evidence whatsoever, willing or unwilling, ought to be excluded : for that although in certain cases it may be right that this or that lot of evidence, though tendered, should not be admitted, yet, in these cases, the reason for the exclusion rests on other grounds ; viz. avoidance of vexation, expense, and delay. The proof of this theorem constitutes the first of the three main results.

To give instructions, pointing out the means by which what can be done may be done towards securing the truth of evidence : this is one of the two main problems, the solution of which is here

attempted. The solution of it is the second of the three main results.

To give instructions, serving to assist the mind of the judge in forming its estimate of the probability of truth, in the instance of the evidence presented to it; in a word, in judging of the weight of evidence: this is the other of the two main problems which are here attempted to be solved. The solution of it constitutes the third of the three main results.

Of these propositions, the first, which is the only one of the three by which an opinion is announced, can scarce have failed to present to the mind of the professional lawyer the idea of novelty, and not of simple novelty only, but of paradox. Of my own country I speak in the first place; and the observation may, without much danger of error, be extended to every other of the most highly enlightened nations. Many and extensive are the masses of evidence against which an inexorable door is shut by obligatory rules. But, of the masses of evidence thus excluded, the composition is more or less different as between nation and nation.

As to the third problem,—to give instructions for judging of the truth of evidence,—so far as the proposition contained in the leading theorem is contradicted by authoritative practice, the solution of this problem is rendered unnecessary. An exclusion put upon a lot of evidence saves all discussion respecting the degree of weight to be allowed to it. Shut the street door in a man's face, you save the trouble of considering the degree of attention that shall be shown to him in the house.

**Objections, the effect of which (if allowed in**

that character) is to exclude the testimony of a witness altogether, are in the language of English law stiled objections to his *competency*.

Translated then into the language of English law, the following is the import of the first of the three propositions. In the character of objections to competency, no objections ought to be allowed.\* Willing or unwilling, witnesses of all descriptions ought to be heard : the willing not to be excluded on any such grounds as those of imbecillity, interest, or infamy ; the unwilling not to be excused on any such ground as that of their unwillingness, either established or presumed : not even in any such cases as those of family-peace-disturbing, trust-betraying, self-convicting or accusing, self-disgracing, or in any other way self-prejudicing evidence.

Of the matter contained in any English law-book bearing the word Evidence on its title page, a principal part consists of references to decisions by which objections to evidence have been either allowed or disallowed in the character of objections to competency. In the character of objections to competency, so far as the proof here given of the first of the three above-mentioned propositions were deemed satisfactory, they would be disallowed, all of them, in the lump.

\* Understand, so far as rectitude of decision is the only object. If on any other ground any exemption be established, it will be on that of delay, vexation, or expense : viz. on the supposition, that the certain mischief flowing from one or more of these sources will be more than equivalent to the contingent mischief apprehendible from the danger of wrong decision, in consequence of the exclusion of the evidence.

But even in this case, the experience and reflection, which dictated the allowance given to those objections in judicial practice, would not be altogether lost. Disallowed in the character of objections to competency, there is not one of them (those only excepted, in which the exclusion turns on the ground of unwillingness) that would not be to be allowed in the character of an objection to credit—to credibility. And it is in this character that they will afford so much matter to be employed in the solution of the latter of our two problems: they will serve in the framing of the rules or instructions for estimating the weight of evidence.

In stating the dispositions of the English jurisprudence on the subject of evidence, there will be occasion to lay down and establish the following propositions:

1. That the system, taken in the aggregate, is repugnant to the ends of justice; and that this is true of almost every rule that has ever been laid down on the subject of evidence.

2. That it is inconsistent even with itself; and in particular, that there is not a rule in it which is not violated by a multitude of exceptions or counter-rules, which are observed in cases in which the reason of the rule so violated applies with as much force as in the cases where it is observed.

3. That this inconsistency has place, not only as between rule and rule, but as between period and period: between the system observed in former periods, and the system observed in later periods.

4. That, consequently, the objections drawn from the topics of innovation, subversion, &c.

do not bear, in the present case, against the introduction of a rational and consistent system: inasmuch as reasonable dispositions might be substituted, in many if not most cases, by the mere adoption of the exceptions, to the exclusion of the general rule.

5. That the fittest hand for introducing improvement into this branch of legislation, would be that of the legislature.

6. But that it might be introduced even by the judicial authority, without that inconvenience which would attend the making changes by this authority in the texture of the substantive branch of the law. The exclusive rules relative to evidence belong to the adjective branch of the law: the effect of them is to frustrate and disappoint the expectations raised by the substantive branch. The maintenance of them has this effect perpetually: the abolition of them, even though by the judicial power, would have no such effect, but the contrary.\*

If the discovery of truth be the end of the rules of evidence, and if sagacity consist in the adaptation of means to ends, it appeared to me that, in the line of judicature, the sagacity dis-

\* The terms, *adjective* and *substantive*, applied to law, are intended to mark an important distinction, first pointed out to notice by this author; viz. the distinction between the commands which refer directly to the ultimate ends of the legislator, and the commands which refer to objects which are only the means to those ends. The former are as it were the laws themselves; the latter are the prescriptions for carrying the former into execution. They are, in short, the rules of procedure. The former Mr. Bentham calls the substantive law, the latter the adjective.—*Editor.*

played by the sages of law was as much below the level of that displayed by an illiterate peasant or mechanic in the bosom of his family, as, in the line of physical science, the sagacity displayed by the peasant is to the sagacity displayed in the same line by a Newton. No peasant so stupid as to use a hundredth part of the exertion to put it out of his own power, for his own benefit and that of his family, to come at truth and to do justice within the circle of his family, as what have been employed by those sages to put it out of their power to discover truth and do justice for the benefit of their fellow subjects within the circle of the state.

Such were the reflections that presented themselves to an uninformed, but happily a new and uncorrupted understanding, on the opening of the grand fountain of legal instruction on the subject of evidence, the work of the Lord Chief Baron Gilbert.

At the distance of half a century, the first conceptions of youth have been submitted to and confirmed by the cautious scrutiny of riper years. The result of that scrutiny is now submitted to the public eye.

It appeared to me that no private family, composed of half a dozen members, could subsist a twelvemonth under the governance of such rules; and that were the principles from which they flow to receive their full effect, the utmost extravagance of Jacobinism would not be more surely fatal to the existence of society than the sort of dealing, which, in these seats of elaborate wisdom, calls itself by the name of justice. That the incomprehensibility of the

law, a circumstance which, if the law were wise and rational, would be the greatest of all abuses, is the very remedy, which, in its present state, preserves society from utter dissolution; and that if rogues did but know all the pains that the law has taken for their benefit, honest men would have nothing left they could call their own.

Such was the prospect that presented itself to me on my entrance upon this branch of moral science. I had come warm to it from the study of physical science. I had there seen the human mind advancing with uninterrupted and continually accelerated progress towards the pinnacle of perfection: facts wanting, but, by the unmolested and even publicly assisted industry of individuals, the deficiency continually lessened, the demand continually supplied: the faculty, the organ, of invention sound, and by wholesome exercise increasing in vigour every day: errors still abundant enough, but continually and easily corrected, being the result not so much of prejudice as of ignorance: every eye open to instruction, every ear eager to imbibe it. When I turned to the field of law, the contrast was equally impressive and afflicting.

Plowden, one of the heroes of jurisprudence, of the growth of the sixteenth century, was a deserter from one of those professions which are built on physical science: he flourished towards the latter part of the reign of Elizabeth. From the report of a cause relative to a mine, he took occasion to unfold to the eyes of his brethren of the long robe the wonders of mineralogy: a

*terra incognita*, as strange to them as America had been to their immediate progenitors. "The theory of mineralogy," said he, "is to the last degree a simple one. In sulphur and mercury, the Adam and Eve of the mineral creation, the whole tribe of metals behold their common parents. Are they in good health? the two perfect metals, gold and silver, are the fruits of their embrace. Do they labour under any infirmity? the effects of it are seen in the imperfect metals, their imperfect progeny."

It rests with the reader to judge, whether the principles of mineralogy, as delivered by Plowden, are more absurd in comparison of the principles of the same science, as delivered by Lavoisier, than the principles of the law of evidence as delivered by Gilbert, and practised by the infallible and ever-changing line of succeeding sages, will be found when compared, I will not say to the truest principles, but to the rules unconsciously conformed to in the humblest cottages.

The peasant wants only to be *taught*, the lawyer to be *untaught*: an operation painful enough, even to ordinary pride; but to pride exalted and hardened by power, altogether unendurable.

Supposing all this to be true; supposing the law of evidence to be in so bad a state, all the world over, as it has here been represented, so incompetent on every occasion to the discovery of truth, so incompetent therefore, on every occasion, to the purposes of justice; how could things have gone on as they have done, how could society have been kept together? Such

are the observations that would be apt enough to present themselves, on this occasion, to an acute and discerning mind.

The answer is that, all the world over, what has been done by the law towards the preservation of society, has, on this ground, as on so many other grounds, been done, not so much by what the law is in itself, as by the opinion that has been entertained of it. But as the conception, such as it is, that non-lawyers have had it in their power to obtain, and have been accustomed to entertain of it, has been derived from the only source from which it could have been derived, viz. the account given of it by lawyers; and as, according to all such accounts, the law has at all times, and through all its changes, been the perfection of reason; such, therefore, it has in general been taken to be, by the submissive and incurious multitude. By their own experience, its imperfections must all the while have continually been exhibited to their view; but experience is not sufficient always to open the eyes that have been closed by prejudice. What their experience could exhibit to them, was the *effect*: what their experience could not exhibit to them, was the *cause*. The effect, the sufferings themselves, that resulted to individuals from the imperfections of the law, were but too indubitable: but the cause to which they were imputed, was the invincible and irremediable nature of things, not the factitious and therefore remediable imperfections of the law. The law itself is perfect: this they heard from all quarters from whence they heard any thing about the matter. This they heard at all times, and on all occasions,

from the only men who so much as pretended to know any thing about the matter.

The law is an Utopia: a country that receives no visits, but from those who find their account in making the most favourable report of it.

All this while the violations of justice have been continual. But had they been ever so much more frequent, they would scarcely have contributed more effectually than they have hitherto done, to lay open the real state of the case, the true cause of the mischief, to the public eye. To individuals, that is, to the suffering party in each case, and his immediate connections, the suffering produced by those violations was more or less acute: but even to the individual who suffered, his own suffering, considering the source it was seen to flow from, scarce presented itself in the character of a grievance. To the public at large, it could never have presented itself in any such character: because, to the public at large, it has always been impossible to know anything about the matter. To lawyers, the suffering has all along been known, and fully known: but to lawyers, how, in the nature of men and things, has it been ever possible that it should have presented itself in the character of a grievance? What sensation is ever produced in the breast of an angler by an impaled and writhing worm? in the breast of a butcher, by a bleeding lamb? in the breast of an hospital surgeon, by a fractured limb? in the breast of an undertaker, by the death of the father or mother of an orphan family? If a fly were to be put on the hook, in a month when a worm is the proper bait—if

the lamb were to be cut up into uncustomary joints—if, in the tying up of the stump after amputation, a three-tailed instead of a five-tailed bandage were to be employed—if, in the decorations of the coffin, the armorial bearings of the deceased were to be turned topsy-turvy—if the testimony of a duke or an alderman, exposed to the temptation of a sinister interest to the value of the tenth part of a farthing, were to be admitted, and an oppressed widow or orphan family gain their rights in consequence—if the rules established in the several professions, established with reason or against reason, were to undergo violation—these are the incidents by which, in the several classes of professional men, a sensation would be produced; meaning always a sensation of the unpleasant kind.

In English legislation, the causes, meaning the ultimate and original causes, of the imperfections the removal of which is endeavoured at in the present work, are no other than those from which the whole swarm of imperfections, with which the whole body of the law is still infested, derive either their existence or their continuance.

Inclination, power, knowledge—these three preliminary requisites concurring, the work, whatever it be, the work, how useful soever, how arduous soever, is accomplished. Any one of them failing, it remains unaccomplished; the accomplishment of it is impossible. And in so far as any one of them fails, in so far must the accomplishment, should it have proceeded to a certain length, remain imperfect.

For a work which is at once so arduous and laborious, adequate inclination cannot be looked

for with any rational prospect of success, unless it have been committed to some workman, and he a competent one, under the character of a duty.

A duty, be it what it may, will never be fulfilled, any further than it is the interest of each person, concerned in the work, to do that which is his duty.

Apply these well known and undisputed and indisputable principles to the work in question—the removal of the imperfections in question, as well as all other imperfections of the law.

Of the three altogether indispensable requisites, power, power in quantity and quality altogether adequate, cannot be denied to be in existence. It is the only one of the three that is.

As to inclination, and, in the first place, as to duty; what is every man's business is no man's business: what is every man's duty in name, is no man's duty in effect. Among the sharers of legislative power,—that power being supreme, and the sharers in it collectively irresponsible,—legislation, *i. e.* the proposition of laws, is to each one a right, to no one a duty.

Taking the whole body of the laws together, or with an exception made of this or that particular branch of it,—were the imperfections ever so much more numerous and pernicious than they are, there is not that individual, to whom any one can say with justice, The fault is in you, you have been neglectful of your duty.

It not being to any effectual purpose the duty, still less is it the interest, of any one alive.

With or without knowledge, there exists not, nor in the present state of things can exist, that man whose interest it can be said to be.

Were it the interest of every individual in the whole community, that interest would in each instance be worse than unavailing, if in any instance it were found to exist undirected by the requisite stock of appropriate knowledge.

One class of men there is, by whom the stock of knowledge, appropriate to this purpose, is completely monopolized and engrossed. There is not one of them whose interest acts towards the accomplishment of this most arduous of all possible works : there is not one in whom the force of interest does not act in direct opposition to it. Of all those who have any concern of any kind with the established system, there is not one who would be a gainer by its being better than it is ; there are few, very few, who would not be gainers by its being worse than it is.

Yet, as often as a proposition, of the smallest or of the greatest moment, but more especially of the greatest, is presented to the legislature, a question put at the outset is, Has it the approbation of the gentlemen of the long robe ? If silence, or an answer in the negative, is the result, down drops the proposition dead-born, and a mixture of contempt and indignation, instead of respect and good-will, is the return made to the proposer.

What is more, how ample soever the stock of knowledge may be that is to be found among the exclusive possessors of the appropriate knowledge necessary to the work, in quality it would yet be found far indeed from being adequate. The stock in hand is adapted to its intended

purpose, but it is not suitable to this other purpose.

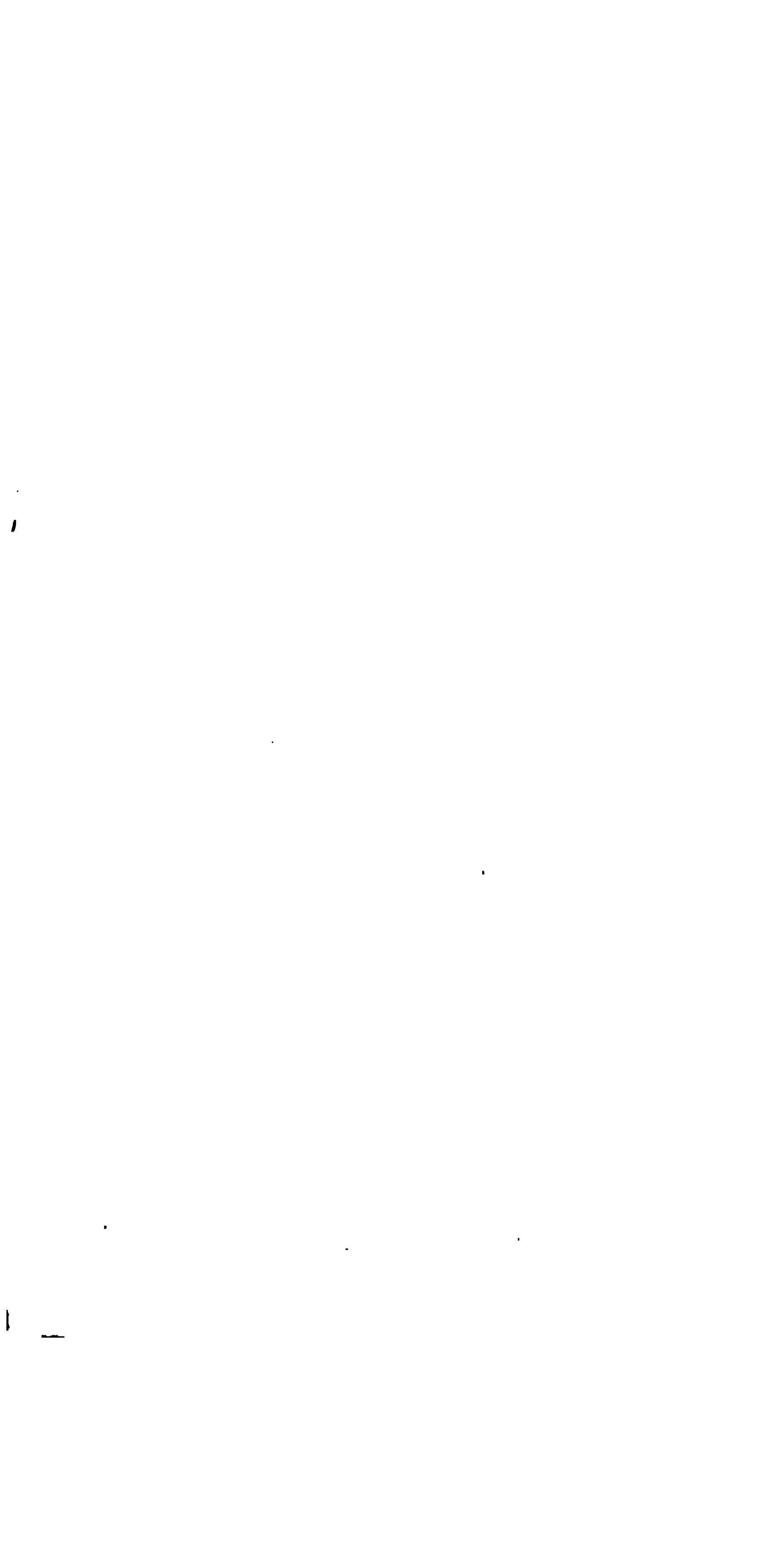
In regard to such arrangements as may, in the course of the following work, be brought to view in the character of remedies to the abuses of which the existing system is composed, two general observations may be found applicable: two observations respecting the reception they may naturally expect to meet with from the two different classes of persons of which the public is composed.

To a non-lawyer, in proportion as an arrangement of this sort appears conducive and necessary to the ends of justice, it will be apt to appear needless. So perfect the system, can it have failed to make provision, the best provision which the nature of things admits of, for the attainment of those ends? The best possible provision—which is as much as to say, either the proposed arrangement, if it be a good one, or one still better.

To a lawyer, in the same proportion, it will accordingly appear odious and formidable. Conscious that no such arrangement is established; conscious that not so much as the semblance of an equivalent, much less any preferable substitute, is established; conscious, if his own horn-book be not completely strange to him, that these abuses are the stuff of which it is made, that to the mischief with which these abuses are pregnant, it contains nothing that is, or can be, or was ever intended to be, a remedy; the light in which it will be his business to represent the remedy, represent it with the best possible effect to the non-lawyer, and therefore, if possible, to himself, will be that of a wild,

fanciful, visionary arrangement; too alien from practice, and therefore too bad or too good—no matter which, either character will serve—to be a practicable one.

On the present occasion, his task, however, will not be altogether an easy one: for in the arrangements which will be proposed in the character of remedies, there is nothing, or next to nothing, that is not in practice, everywhere and every day, before his eyes. Extension, it will be seen, is all they stand in need of.



# EVIDENCE.

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## BOOK I.

### THEORETIC GROUNDS.

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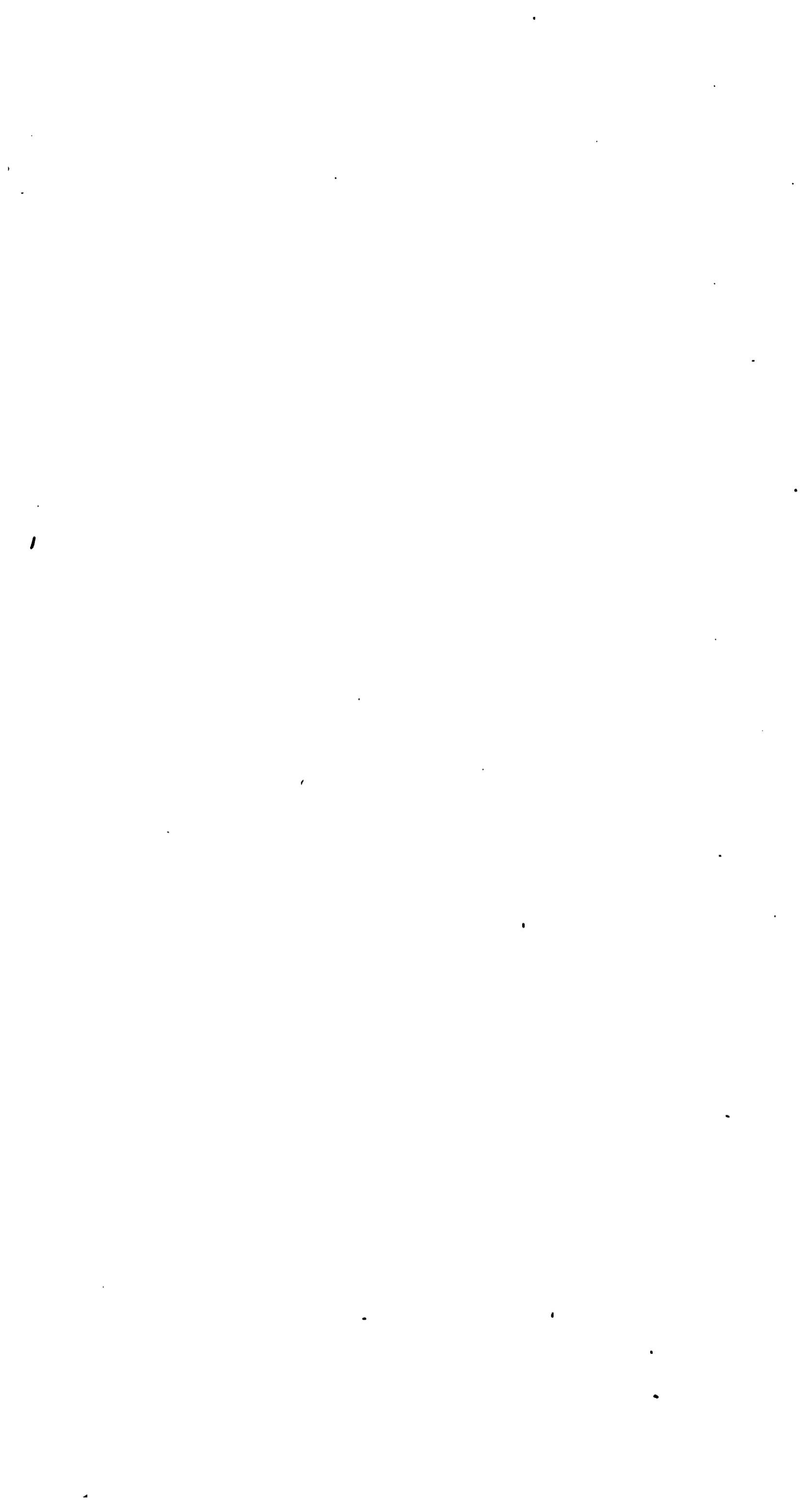
#### CHAPTER I.

##### ON EVIDENCE IN GENERAL.

EVIDENCE is a word of relation; it is of the number of those which, in their signification, involve, each of them, a necessary reference to the import expressed by some other; which other must be brought to view at the same time with it, or the import cannot be understood.

By the term evidence, considered according to the most extended application that is ever given to it, may be, and seems in general to be, understood,—any matter of fact, the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact: a persuasion either affirmative or disaffirmative of its existence.\*

\* In the word evidence, together with its conjugates, *to evidence*, *evidencing*, *evidenced*, and *evidentiary*, the English language possesses an instrument of discourse peculiar to itself: at least as compared with the Latin and French languages.



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evidentiary facts afford a sufficient ground for being *persuaded* of the corresponding existence of the principal facts—is not the less a question of evidence. The matter of fact, which, presented to the mind in one point of view, is called by this one name, is it the *same* matter of fact which, when presented in another point of view, is called by this other name? Do two and two make four: and for example, the two apples on the right hand side of the table, added to the two apples on the left hand side of the same table, are they the *same* apples, and the *same* number of apples, that constitute all the apples now lying before me upon the table? In this question of identity, in this question of nomenclature disguised under scientific forms, we see a question of evidence.\*

The first question in natural religion is no more than a question of evidence. From the several facts that have come under my senses relative to the several beings that have come under my senses, have I or have I not sufficient ground to be persuaded of the existence of a being distinct from all those beings; a being whose agency is the cause of the existence of all

\* The difference, in respect of evidence, between questions of mathematics and questions of purely experimental science, of chemistry, for example, is merely this; that the evidence applicable to the former, is that description of evidence which is founded upon general reasoning; while the evidence applicable to the latter, is evidence of that description which is derived immediately from matters of fact, presenting themselves to our senses. To point out the peculiar properties of these two kinds of evidence, and to distinguish them from one another, belongs rather to a treatise on logic than to a work like the present; which, considering evidence almost exclusively in regard to its connection with judicature, excludes all general speculations which have no immediate bearing upon that subject.—*Editor.*

these; but whose separate existence has never at any time, by any perceptible impressions, presented itself—as that of other beings has done—to the cognizance of the senses.

Evidence is, in every case, a means to an end: a particular branch or article of knowledge, considered in respect of its subserviency towards a course of action in which a man is called upon to engage, in the pursuit of some particular object or end in view.

In the case of a branch of science—physical science—cultivated by a private individual, that object may be the producing some physical effect, whether of a customary or of a new complexion; or perhaps nothing more than the general advancement of the science; the making an addition to the mass of knowledge, applicable in common to the production of useful effects, customarily produced, or newly discovered, as it may happen.

On this ground, a great part of the business of science in general, may be resolved into a research after evidence. The usefulness of it, with reference to the interests of mankind in general, will be in proportion to that of the department of science to which it belongs, and to the place it occupies in that department.

When the conduct to which the evidence in question is subservient, the conduct for the guidance of which the facts in question, and the knowledge obtainable in relation to them, are searched after—when the conduct thus at stake is the conduct of government as such,—of men occupied, on the occasion in question, in the exercise of the powers of government,—the importance of the evidence, and of the conduct

pursued in relation to it, take a proportionate rise.

In the map of science, the department of evidence remains to this hour a perfect blank. Power has hitherto kept it in a state of wilderness: reason has never visited it.

In the few broken hints which, in the form of principles, may be picked up here and there in the books of practice, little more relevant and useful information is to be found, than would be obtainable by natural philosophy from the logicians of the schools.

The present work is the result of an attempt to fill up this blank, and to fill it up with some approach towards completeness. Not the minutest corner has been left unexplored; the dark spots have not been turned aside from, but looked out for.

Among the subjects here treated of are several concerning which not any the slightest hint is to be found in any of the books of practice.

Should this endeavour be found successful, it may be regarded as a circumstance not disadvantageous to the science, that the survey of the subject happened to be postponed to so mature a period in the history of the human understanding. So much the less rubbish to clear away: so much the less prejudice to contend with.

Should it happen to this work to have readers, by far the greater part of the number will be composed of those for whose use it was not intended: those to whom, were it not for the predilection produced by professional interest in favour of the best customer, Injustice, and her handmaid Falsehood.—justice and injustice,

truth and falsehood, would be objects of indifference.

The class of men for whose use it is really designed, is a class composed as yet of those, among whom a personal or other private interest, hostile to that of the public, will prevent it, if not from finding readers, from finding other than unwilling and hostile readers; readers, whose object, in reading the work, will be to consider by what means, with the fairest prospect of success, the work and the workman may be endeavoured to be crushed.

The species of reader for whose use it was really designed, and whose thanks will not be wanting to the author's ashes, is the legislator; the species of legislator who as yet remains to be formed: the legislator, who neither is under the dominion of an interest hostile to that of the public, nor is in league with those who are.

## CHAPTER II.

### OF EVIDENCE, CONSIDERED WITH REFERENCE TO A LEGAL PURPOSE ; AND OF THE DUTIES OF THE LEGISLATOR IN RELATION TO EVI- DENCE.

So much for evidence in general ; evidence taken in the largest sense of the word, considered under every modification of the subject to which it may come to be applied—of the nature of the fact sought—the fact, to the proof of which it may come to be applied. Hereafter, the only sense in which the word is used, is that in which the application of it is confined to juridical, or say legal, evidence.

Under this limitation, then, evidence is a general name given to any fact, in contemplation of its being presented to the cognizance of a judge, in the view of its producing in his mind a persuasion concerning the existence of some other fact ; of some fact by which, supposing the existence of it established, a *decision* to a certain effect would be called for at his hands.

To give execution and effect throughout to the main, or substantive, branch of the body of the law, is, or ought to be, the main positive end or object of the other branch, viz. the ad-

jective, or that which regulates the system of judicial procedure.\*

Of the system of procedure, one principal part is that which regards the presentation, or say exhibition, of the *evidence*—the delivery, and receipt or extraction, of the *evidence*.

Preparatory and necessarily antecedent to every operation, or series of operations, by which execution and effect are given to an article of substantive law, is judgment, decree, decision.

Whatever be the decision by which a cause or suit at law is, as to all except execution, terminated,—this decision has for its subject matter two constantly concomitant points or questions,—the point or question of *law*, and the point or question of *fact*.

So far as regards the question of fact, the decision, in so far as it is just, depends upon and is governed by the evidence.

Judicature, like all the other operations of government, consists in rendering a service to some person or persons : to the plaintiff, if the decision be in his favour ; to the defendant, if in his.

The service rendered by the judge to the plaintiff, by a decision in favour of the plaintiff's side of the cause, consists, according to the nature of the demand, either in putting him in possession of some right, or assemblage of rights ; or in administering to him satisfaction in respect of some wrong or wrongs, whether in the shape of compensation to himself, or of punishment to the wrong doer.

\* See ante, p. 5—note.

The service rendered by the judge to the defendant, by a decision in favour of the defendant's side of the cause, consists in exonerating him of the obligation sought to be imposed upon him by the plaintiff's demand.

The state of the facts, as well as the state of the law, being such as to confer on the plaintiff a title to such or such a right, or to satisfaction on the score of such or such a wrong; if evidence, and that of a sufficient degree of *probative force* to satisfy the judge, of the existence of the necessary matter of fact, be wanting; the law, in that instance, fails of receiving its due execution and effect; and, according to the nature of the case, injustice in the shape of non-collation\* of rights where due, non-administration of compensation where due, or non-administration of punishment where due, is the consequence.

\* By collation of rights, Mr. Bentham means that species of service which the judge renders to any person by putting him in possession of a certain right. Non-collation of rights has place when that service is not rendered,—when the person in question is not put in possession of the right.

So, collative facts are those facts which have been appointed by the legislator to give commencement to a right: thus, under English law, in the case of the right to a landed estate, collative facts are, a conveyance executed in a particular form, a devise, and the like: in the case of the rights of a husband over a wife, and *vice versa*, the collative fact is the ceremony of marriage, and so on. Collative facts are also sometimes called by Mr. Bentham *investitive* facts.

In like manner, *ablative*, or *divestitive* facts, are those which take away rights: as in the case of property, gift or sale to another party: in the case of several of the rights of a father over his child, the child's coming of age, &c. &c.—*Editor.*

If either the state of the facts, or the state of the law, fails of being such as to confer on the plaintiff a title to the service demanded by him as above; injustice to the prejudice of the defendant's side would be the consequence, were the judge to impose upon him the burdensome obligation to which it is the object of the plaintiff to subject him. And so far as his title to an exemption from such obligation is constituted by a matter of fact, so far it depends upon evidence: and if, such matter of fact having on the occasion in question been in existence, the evidence necessary to satisfy the judge of its existence be wanting, so far injustice, as above, is the consequence of such want of evidence.

Hence arises one natural and proper object of the legislator's care, viz. to see that the necessary evidence be *forthcoming*.\*

But if the effect of such evidence as comes to be presented to the judge be to produce in his mind a material and decisive deception, viz. the persuasion of the existence of some matter of fact which was not in existence; the consequence of such persuasion being an unjust decision to the prejudice either of the plaintiff's

\* There are many other judicial purposes for which it is necessary that things and persons should be forthcoming, besides that of being presented to the judge in the character of sources of evidence. The subject of Forthcomingness, therefore, belongs to the general subject of Procedure. And as the arrangements necessary to secure the forthcomingness of persons and things to serve as sources of evidence, do not differ from those which are necessary to secure their forthcomingness for any other judicial purpose, they do not properly form part of the subject of the present work.—*Editor.*

side, or of the defendant's side, as above ; the effect of such fallacious evidence may be the same as that which might have been produced, as above, by the failure, the want, the deficiency of evidence.

Hence arises another natural and proper object of the legislator's care, viz. guarding the judge against the deception liable to be produced by fallacious evidence.

Subordinate to this object, are the following two :—1. To give instructions to the judge, which may serve to guide him in judging of the probative force of evidence.—2. To take securities that the evidence itself shall possess as great a degree of probative force, in other words, shall be as *trustworthy* as possible.

The properties, which constitute trustworthiness in a mass of evidence, are two ; correctness and completeness.

The property that presents itself in the first place as desirable on the part of an aggregate mass of evidence, is, that, as far as it goes, it be correct : that the statement given in relation to the matter of fact in question, be as conformable as possible, at least in respect of all material circumstances, to the facts themselves. In proportion as it fails of possessing the perfection of this property, in the same proportion will the mass of evidence fail of attaining the maximum of trustworthiness : in the same proportion will be the danger of deception and consequent mis-decision on the part of the judge.

First desirable property in an aggregate mass of testimony, *correctness*.

Another property, the desirableness and essen-

tiality of which is no less obvious on the part of an aggregate mass of testimony, is that of being *complete*: that the statements of which it consists comprehend, as far as possible, and without omission, the aggregate mass of all such facts, material to the justice of the decision about to be pronounced, as on the occasion in question really had place.

Let the aggregate mass of evidence be deficient in respect of completeness, its correctness, instead of a cause of trustworthiness, may be a cause of the opposite quality: instead of a security against deception and consequent mis-decision, it may be a necessarily efficient cause of these undesirable results.\*

\* Suppose two witnesses, both veracious and correct; the testimony of each, of a nature to belong to the head not of direct, but of circumstantial evidence: the facts which Primus is enabled to prove, none but what are of a nature to afford inductions, which, if admitted, and standing alone, will be decisive in favour of the plaintiff's side: the facts which Secundus is enabled to prove, none but what are of a nature to afford inductions decisive in like manner in favour of the defendant's side. Suppose now the testimony of Primus received, while that of Secundus is not received, or *vice versa*, the consequence is obvious.

Suppose again but one witness, veracious and correct as before, having two facts to state, of the nature of circumstantial evidence, as before, but one of them of a nature to afford, supposing it to stand alone, inductions decisive in favour of the plaintiff's side; the other of a nature to afford, in like manner, inductions alike decisive in favour of the defendant's side. By situation and personal character, moral and intellectual, the witness, being subjected to examination, is disposed to state with perfect correctness whatsoever facts the questions propounded to him appear to call for, but no others. Examined by the judge, the questions put to him are such, whether by design or inadvertence, as to draw from him those facts alone which are favourable to the plaintiff's side, or those facts alone

Applied to evidence, the term *incompleteness* designates different objects, according as it is applied to a single lot or article of evidence, such as the testimony of a single individual, or to a body of evidence considered in the aggregate: in the latter case, the body may be rendered incomplete, either by incompleteness on the part of any one or more of the articles of which it is composed, or by the entire absence of any one or more of the articles which might and ought to have entered into the composition of it.

Neither incompleteness nor incorrectness have any tendency to produce deception any farther than as *partiality* is the accompaniment or the result: but unless in the rare and just imaginable case, where the incompleteness and incorrectness operate on both sides, and in such manner as to produce on each side a diminution of probative force exactly equal, partiality, intended or unintended, to the prejudice of one or other side, will always be the result.

To the qualities of correctness and completeness, impartiality could not with propriety have been either substituted or added: not substituted, because the intimation conveyed by it

which are favourable to the defendant's side: in either case, the consequence is as obvious as before.

Instead of being put by the judge, suppose that the questions propounded to him are selected and put by the plaintiff only, or by the defendant only: the alternative brought to view in the case of the judge, the alternative of design or inadvertence, has, in this case, no longer any place: that such facts alone as are favourable to the plaintiff's side will be fished for by the plaintiff's questions, is too natural a state of things not to be reckoned upon as certain: and so, *vice versa*, in the defendant's case.

would be an intimation rather of the state of the deponent's mind than of the quality of his evidence : not added, because the intimation conveyed by it would be that of an imperfection distinct from both ; whereas, supposing the evidence neither incorrect nor incomplete, neither can the evidence itself be other in its tendency than impartial, nor is the state of the deponent's mind material to the purpose.

Again : the operations necessary to the presentation of the evidence to the senses and cognizance of the judge, are in every instance unavoidably attended with a certain degree of inconvenience, in one or more of three shapes : viz. delay, vexation, and expense. If in any instance it should happen, as in many instances it may and does happen, that the relative magnitude and weight of this inconvenience is such as to render it preponderant over the mischief of whatever chance there may be, that injustice, as above, may be produced for want of the evidence ; on that supposition, it is better that the evidence in question be not presented than that it should be presented.

And here we see a third natural and proper object of the legislator's care, viz. guarding against the production of inconvenience in the shape of delay, vexation, or expense : to wit, in so far as such inconvenience is either superfluous, or, in comparison with the mischief attached to the injustice resulting from the exclusion of the evidence, preponderant.

Vexation and expense being incident to the presentation of evidence, legal powers adapted to that purpose will be requisite : in every case, powers of the compulsive kind, operating by

means of punishment; and, in some cases, powers of the alluring or attractive kind, operating by means of the matter of reward.

To arm the judge with powers of this description, applicable to the nature of this case, will thus constitute a specific object of the legislator's care, referable to the general head above brought to view, viz. securing the forthcomingness of evidence. But this being among the operations that fall under the head of procedure, belongs not to the present work.

A condition necessarily previous to any determinate operation, directed to the causing of this or that article or source of evidence to be presented to the cognizance of the judge, is the knowledge, or at least the conjectural conception, of its existence. Of evidence, the existence of which is not known at the outset of the suit, the existence may sometimes be discovered in the course of it. Either immediately, or with the intervention of any number of links, one article of evidence may lead to the discovery and to the successful investigation of another.

To arm the judge, and, through the medium of the judge, the parties on either side, with the powers necessary to the investigation of evidence, constitutes accordingly another natural and proper specific object of the legislator's care, subordinate to the same general object, securing the forthcomingness of evidence. But this likewise must be referred to the subject of procedure, not coming within the design of the present work.

In contemplation, and for the eventual support, of a right or rights already created and conferred, or considered as about to be created

and conferred, the providence of individuals, and in some instances of government itself, is in use to create or appoint a correspondent and appropriate species of evidence, which, in consideration of such its destination, may be distinguished by the general denomination of *pre-appointed* evidence.

To favour the institution of this useful species of evidence, constitutes another specific object of the legislator's care, subordinate to the same general head, securing the forthcomingness of evidence.

Under each of these several heads (those only excepted which belong more properly to the subject of Procedure) a view will be presented, in the first place of what seems *proper* to be done in the way of legislation, in the next place of what *has* been done in the way of legislation; including the work of which so little has been done, the work of the genuine legislator, and the work of which so much has been done, the work of the pseudo-legislator, the judge,—the judge, making, as he goes, under pretence of declaring, that part of the rule of action which has the form of law.

Speculation, to whatever extent pursued, is of no value, except in so far as it has a practical purpose. In the present work, the extent to which the speculative discussions contained in it are pursued, is considerable: but the view with which they were written is altogether practical. The object was to find an answer to this question,—What ought to be the part taken by the legislator in relation to evidence?

The subject of Evidence being but a branch of the subject of Procedure, both have their foun-

dation in one common set of principles. These principles are, the ends, the direct and collateral ends, of justice, the proper and legitimate ends of procedure : on the one hand, rectitude of decision ; which may be said to have place when rights are conferred, and obligations imposed, by the judge, on those persons, and those only, on whom the legislator intended that they should be conferred and imposed : on the other hand, the avoidance of unnecessary delay, vexation, and expense. The first may be called the direct end, the three latter the collateral ends of justice.

These ends are the ends, and the only ends, aimed at in the arrangements proposed in the course of this work. In the form of reasons for the several arrangements, their subserviency to these ends is all along brought to view. Subserviency to these ends is in like manner the standard to which the merit or demerit of the corresponding arrangements of actually established law are all along referred.

But, when tried by this standard, the arrangements of the existing systems of law being found in every part enormously, and to all appearance purposely ; defective, the inquiry would, it seemed, have been imperfect, and, comparatively speaking, uninstructive, if the cause of such their aberration had not at the same time been pointed out. This cause appeared to lie in the opportunity which the authors of these arrangements had of directing them, as under the impulse of sinister interest it appears they did direct them, to the prosecution of certain false ends, and in particular their own professional and personal emolument and advantage.

To the pursuit of the legitimate ends, as far as they have been pursued, the system which may be distinguished by the name of the natural system of procedure, has owed its birth; to the pursuit of the spurious and sinister ends, the technical system of procedure. Of the natural system, in every family the domestic, and in most states various courses of procedure comprehended under some such name as the summary, may afford exemplifications.

For the purpose of ascertaining what arrangements under each head promised to be most conducive to the attainment of the ends of justice, it seemed necessary to trace up to their sources or causes the several mischiefs opposite to these ends; the evils, in the avoidance of which, the attainment of those ends consisted. When on this occasion a circumstance presented itself in the character of an immediate cause of any one of those evils, that immediate cause was seen to originate in a higher cause, that higher on one still higher, and so on in some instances as high as through four or five degrees or removes. These causes presently distributed themselves into two divisions: *natural*, the original and irremediable work of nature; *factitious*, the work of human agency or omission, of human artifice or imbecility. In the factitious causes might be seen the result partly of folly, partly of improbity; of that improbity on the part of the authors of those arrangements, which consists in the pursuit of the sinister ends above mentioned.\*

\* The principal divisions of the subject being thus pointed out, it may be useful to exhibit a summary view of the topics that might be expected to be handled in a work on Evidence,

but of which some belong more properly to a work on Procedure at large, others are included under the foregoing heads.

1. *Examination of deponents*,—mode of conducting the examination so as to avoid producing deception on one hand, or preponderant vexation, expense, and delay on the other: see Book II. SECURITIES, and Book III. EXTRACTION.

2. Of the *number* of witnesses to be required. Requiring two witnesses is excluding every witness that does not come accompanied with another. The propriety of this exclusion stands upon different ground in the two cases of *ordinary* or *casual*, and *pre-appointed*, evidence. See Book IX. EXCLUSION, and Book IV. PRE-APPOINTED.

3. Of *conclusive* evidence. Making any evidence conclusive is excluding all evidence on the other side. See Book IX. EXCLUSION.

4. *Authentication* of evidence; including as well orally-delivered, as ready-written, evidence. See the Book so entitled (Book VII).

5. *De-authentication*, or detection of unauthenticity: by this is done in regard to authenticity, what by examination and counter-evidence is done in regard to truth. See Le Clerc's *Art Critica*, and Book VII. as above.

6. Of *appropriate* evidence. Under this head might come all discussions on the appositeness of evidence in relation to the terms of the instrument of *demand* or the instrument of *defence*. But the foundation of this enquiry is not in the nature of things, but merely in the technical forms of English Common Law. It has no place in Roman, nor even in English Equity Law. It belongs more properly to Procedure at large than to Evidence.

7. Of the *onus probandi*: on whom it lies.—Another title, the importance of which arises chiefly out of the imperfections of English Common Law; and in particular of that feature of it which forbids to draw the relation from the mouths of the parties, that is, from those who are likely to have been best acquainted with the facts. In general, the proof of all facts necessary to constitute the ground of a demand, lies upon the plaintiff, by whom the demand is made; and so upon the defendant, in the case of the defence. Any exceptions should turn upon proportions, as between delay, expence, and vexation, on each side, arising out of the particular nature of each species of demand or defence; that is, of the matters of fact of which the ground of each is composed. This topic too seems to belong rather to Procedure than to Evidence.

8. Of the means of causing evidence to be *forthcoming*:—  
i. e. of causing persons and things, in the character of sources of evidence, to be forthcoming, and to yield the evidence of which they have the capacity to become sources. This topic belongs clearly to the subject of Procedure.

9. Of *indicative* evidence.—Indicative evidence is a name that may be given to any evidence, in respect of its being so, not in relation to the principal fact in question, but in relation to the existence of this or that person or thing, in the character of a source, from whence evidence, which is such with relation to the fact in question, may be derived: When evidence of the fact in question is *investigated*, it is through the medium of indicative evidence. This belongs to Procedure.

10. Of *spontaneously-delivered* evidence.—Spontaneously delivered, is a name which may be given to evidence when delivered without interrogation. See Book II. SECURITIES, and Book III. EXTRACTION.

11. Of evidence *sine lite*.—An example of this is, where, to enable a man to receive money from an officer employed in the payment of public money, evidence shewing his title must be produced. Here, as elsewhere, the object is to guard against deception in the most effectual way possible, without preponderant or unnecessary vexation, expense, and delay.\*

12. Of *scientific* evidence: a name that may be given to information delivered by persons whose capacity of furnishing it is founded on skill and experience in some particular line of art and science. Persons of this description, though in English law confounded with witnesses, and, not without advantage, treated as such, are in fact a sort of assistants to the judge, and as such treated by Roman law.

In the case of Le Brun, a domestic servant, erroneously convicted of the murder of his mistress, Madame Mazel, at Paris, by a sentence of the Lieutenant-Criminel, dated 18th January 1690,† mention is made of five sorts of professional persons, to whom the denomination of *experts* is applied, and of whose evidence the substance is reported. Locksmiths, to explain the nature of a master-key, known to have been in his possession, and its relation to other keys belong-

\* On this subject a few pages had been written by Mr. Bentham, but he had never completed the enquiry, and the manuscript in the hands of the Editor was so incomplete that he has thought it best to suppress it.

† Causes Célèbres, vol. iii. p. 309.

ing to the same locks. Cutlers, to say whether there was any relation between a knife found upon the person of the defendant, and another knife which appeared to have been made use of in his committing the murder, but had been found in another place. Peruke-makers, to say whether a few hairs, that had been found in the clenched hand of the deceased, might have been the defendant's, and plucked from his head. Washerwomen, to make a comparison between the shirts and neckcloths of the defendant, and a bloody shirt and neck-cloth that appeared to have belonged to the murderer, and to have been stained with blood, in the course of the struggle. Rope-makers, to say whether there was any resemblance between some cords that had been found in the possession of the defendant, and a strange cord which, it was thought, might have been made use of, or provided for the purpose of the murder. All these *experts* are mentioned as having been nominated by the Lieutenant-Criminel, the judge.

13. Of time and place—their influence on the subject of evidence.—The principles brought to view in an already published work,\* will be applied to this ground, wherever necessary, in the present publication.

14. English technical writers reviewed, with a view to the method observed, and the rules laid down by them on the subject of evidence.—Comments of this description are incidentally introduced, wherever they appear to be called for by the occasion.

\* *Essai sur l'Influence des Temps et des Lieux en Matière de Legislation*,—published in vol. iii. of “*Traité de Legislation*,” edited by M. Dumont.

## CHAPTER III.

### OF FACTS—THE SUBJECT MATTER OF EVIDENCE.

THE term *evidence*, as has already been remarked, is a relative term. Like other relative terms, it has no complete signification of itself. To complete the signification of it, to enable it to present to the mind a fixed and complete idea, the object to which it bears a necessary reference must be brought upon the stage. I have to produce evidence. Evidence of what? Evidence of a certain *fact* or *facts*. Facts then, matters of fact, are the subject matter, the necessary subject matter of evidence: facts in general, of evidence in general. Before we come to speak of evidence in detail, it will be necessary to say something of facts in general, considered as the subject matter of evidence.

Of facts? Yes: but in what point of view considered? Not in every point of view, but in the particular point of view in which the contemplation of them is pertinent to the design and object of this treatise. Not in a physical, not in a medical, not in a mathematical point of view; not in a barren, and purely speculative, logical point of view; not in any point of view, but a legal.

The facts then, or matters of fact, the species of facts, the individual facts, here under consideration, are those facts, and those only, concerning the existence or non-existence of which, at a certain point of time and place, a persuasion may come to be formed by a judge, for the purpose of grounding a decision there-upon.

Thus then, the circle, within which the class of facts in question is comprised, presents itself as a comparatively narrow one.

In the next view that requires to be given of it, the extent of it will appear boundless. Nor indeed does it admit of any other limits than those which are set to it by the nature of the end or purpose, with a view to which, the world of facts is brought thus upon the stage.

Facts then, considered as the subject matters of legal decision, and for that purpose of evidence, may be distinguished in the first place into *principal* and *evidentiary*.

What is meant by the words *principal fact*, and *evidentiary fact*, has been seen in a former chapter.\* The question now is, what facts are to be considered principal facts, and evidentiary facts, with reference to a legal purpose.

By *principal* facts, I mean those facts, which, on the occasion of each individual suit, are the *facts sought*, for the purpose of their constituting the immediate basis or ground of the decision: insomuch that, when a mass of facts of this description, having been sought, is deemed to have been found, the decision follows of course, whe-

\* *Suprà, chap. I.*

ther any other facts be considered as found or not.

By evidentiary facts, I mean such facts as are not competent to form the ground of a decision of themselves, nor otherwise than in as far as they serve to produce in the breast of the judge a persuasion concerning the existence of such and such other facts, of the description just given, viz. principal facts.

Here then it is that the circle expands itself, and seems to break all bounds. Under the term *principal facts*, when the mass comes to be analyzed and divided, facts of a particular description, and that a limited one, will be seen to be comprised. But under the description of *evidentiary facts*, all facts whatsoever—at least all facts that are capable of coming under human cognizance—will be seen to be included. For there is no sort of fact imaginable, to which it may not happen to serve as evidence with relation to some principal fact. It is only by the consideration of the purpose for which the mention of them is introduced, that the view we are called upon to take of them is circumscribed.\*

The mass of *principal* facts, so termed with relation to judicial investigation and evidence, comes now to be dissected and spread out.

\* In a succeeding chapter, a distinction will come to be exhibited between what is called *direct* and what is called *circumstantial* evidence. Direct evidence is testimony, or other evidence, applying immediately to some *principal* fact as above distinguished: circumstantial evidence is evidence applying immediately not to any such *principal* fact, but to some evidentiary fact: to some other fact which is evidentiary with relation to such *principal* fact.

The task would have been a long and laborious one, had it not already been performed for other purposes.

In a work which is already before the public,\* the mass of facts coming directly under the cognizance of law, has been thus divided.

In the penal branch, the facts that become the subject matter of regulation to the legislator, and thence, of decision and enquiry to the judge, are—

To be proved by evidence adduced on the part of the plaintiff. { 1. Facts of an inculpatory, or say criminative tendency.  
2. Facts of an aggravative tendency.

To be disproved by evidence on the part of the plaintiff, or proved by evidence on the part of the defendant. { 1. Facts of an exculpatory, or say justificative tendency.  
2. Facts of an exemptive tendency; viz. with reference to the punishment or other burdensome obligation.  
3. Facts of an extenuative tendency.†

To every distinguishable species of offence, to

\* Dumont.—*Traité de Législation Civile et Penale.*—Paris, 1802.

† Facts of these respective tendencies, as thus applied, are also termed *circumstances*: circumstances of inculpation, exculpation, &c.: for any fact may be a circumstance with reference to any other fact. *Circumstantia*: objects by which a given object is considered as encompassed—which are considered as *standing round* it.

every modification of delinquency, belongs its separate train of principal facts, as characterized by the above distinctions.

In the non-penal branch of substantive law and procedure—

To be proved by evidence adduced on the part of the plaintiff.

To be disproved by evidence on the part of the plaintiff, or proved by evidence on the part of the defendant.

*Collative*, or say *investitive* facts; viz. with relation to the right which he claims to have *conferred* on him, with which he claims to be *invested*, by the decision of the judge.\*

*Ablative*, or say *divestitive* facts; viz. with relation to the right which the plaintiff claims to have *conferred* on him: the right which can not be conferred on the plaintiff, but by imposing on the defendant the obligation correspondent to it.†

To trace the connection between the several principal facts, (whether individual facts be meant, or species of facts,) and the several evidentiary facts respectively related to them in that character, would be, practically speaking, if not strictly and literally, an endless task: at any rate it will not be attempted here. Volumes, equal in bulk and number to those of

\* Events, or other facts, constitutive of title.

+ Events, or other facts, destructive of title.

an encyclopedia, might be written on this one subject. That the connection between such and such classes of principal facts and their correspondent evidentiary facts, is a subject on which it is impossible that any light should be thrown by rules or observations, is more than I would take upon me to assert. But in this case the field of enquiry is so vast, that it appears questionable whether any light which the subject could be capable of receiving from investigation or discussion, would be capable of compensating for the obscurity that would be thrown upon it by the mere quantity of the words, the accumulation of which would be necessary for the purpose. The task would at any rate be a separate one, a task perfectly distinguishable from that of the present treatise.

Hitherto the operation of judging of the degree of connection, of the closeness of the connection, between a principal fact and an alleged evidentiary fact, has been an operation of the instinctive class; an operation which has never been attempted to be subjected to rule, or at least to any other rules than what have been completely arbitrary and irrational. To take the business out of the hands of instinct, to subject it to rules, is a task which, if it lies within the reach of human faculties, must at any rate be reserved, I think, for the improved powers of some maturer age.

Facts at large, whether considered as principal or as evidentiary, may be divided into classes, according to several different modes of division.

If, on the occasion of judicial procedure in general, and the evidence elicited for the purpose of it, no practical benefit were derivable

from the considering facts in this point of view, and under these distinctions; the mention of them would not have found its place in this work. But the conception entertained respecting the nature of the facts, in relation to which evidence will come to be elicited, and the nature of the evidence so applied, and of the application made of it, would without close attention to these distinctions be inadequate, and in practice delusive.

Applying, as they will be seen to do, to every part of the field of thought and action, including that of art and science, the instruction, if any, which may be found derivable from them, will not be the less useful in practice.

Applying, as they will be seen to do, to judicial procedure, sometimes directly, sometimes through the medium of the correspondent substantive branch of law; the utility of the mention here made of them will not be diminished by any application which may be capable of being made of it to any other portion of the field of art and science.

I. *Distinction the first.* Facts physical, facts psychological.

The source of the division here is, the sort of beings in which the fact is considered as having its seat.

A physical fact is a fact considered to have its seat in some inanimate being: or, if in an animate being, by virtue, not of the qualities by which it is constituted animate, but of those which it has in common with the class of inanimate beings.

A psychological fact is a fact considered to have its seat in some animate being; and that,

by virtue of the qualities by which it is constituted animate.

Thus, motion, considered simply as such, when predicated of any being, is a physical fact: true, it is an attribute of animate beings; but not in virtue of those qualities which constitute them animate, since it is equally an attribute of inanimate ones.

But if, to the word motion, we add the word voluntary; we then introduce, over and above the physical fact of the motion, another fact: viz. an exertion of the *will*, considered as preceding and causing the motion. This last fact is a psychological fact; since it is not capable of having its seat in any other than animate beings: nor in them, by virtue of any other qualities than those by which they are constituted animate.

Of these two simple facts—one a physical, the other a psychological fact—is composed the complex fact, *voluntary motion*; a fact of a mixed character, partly physical, and partly psychological.

The classification and arrangement of physical facts must be left to natural philosophers. The classification and arrangement of psychological facts must, in like manner, be left to metaphysicians. It may not be improper, however, to give in this place a short indication of some of the principal classes of psychological facts.

1. **Sensations:** feelings having their seat in some one or more of the five senses; sight, hearing, smell, taste, and touch.

Sensations again may be subdivided into those which are pleasurable, those which are

painful, and those which, not being attended with any considerable degree of pleasure or pain, may be called indifferent.

2. Recollections : the recollections or remembrances of past sensations.

3. Judgments : that sort of psychological fact which has place when we are said to assent to or dissent from a proposition.

4. Desires ; which, when to a certain degree strong, are termed passions.

5. Volitions, or acts of the will, &c.

II. *Distinction the second.* Events, and states of things. Source of the division in this case, the distinction between a state of motion and a state of rest.

By a fact is meant the existence of a portion of matter inanimate or animate, either in a state of motion or in a state of rest.

Take any two objects whatever ; consider them at any two successive points of time : they have, during these two portions of time, been either at rest with relation to each other, or one of them has, with relation to the other, been in motion : has in the course of that length of time changed its place.

The truth is that, as far as we are able to judge, all portions of matter, great and small together, are at all times in motion : for in this case is the orb on which we exist, and, as far as we can judge, all others which come under the cognizance of our senses. When, therefore, in speaking of any portion of matter, rest is attributed to it, the rest ascribed to it cannot be understood in any other sense than a relative one.

Whether they or one of them be in motion, or whether both of them be at rest, any two por-

tions of matter may be considered and spoken of in relation to one another; and in this case the most obvious and simple relation is the relation of distance.

Thus it is then, that, considered in the most simple state in which it can be a subject or object of consideration, a fact may be either a state of things or a motion, and under one or other of these descriptions it cannot but come.

By an event is meant some motion, considered as having actually come about in the course of nature. Thus, whatever be the occasion, the ordinary subjects of consideration and discourse come under the general denomination of states of things, or events, or both.

The fall of a tree is an event, the existence of the tree is a state of things: both are alike facts.

An act or action is a name given to an event in so far as it comes to be considered as having had the human will for the immediate cause of it.

A fact, then, or a matter of fact, is either the existence of two or more things, considered, in relation to one another, as being in a state of rest during successive portions of time,—or an event; in the idea of which event is uniformly included that of motion on the part of some portion of matter, *i. e.* a change in its relative position to, and distance from, some other portion of matter.

An act or action, a human act, a human action, is either external or purely internal. In the instance of an external act, there must of necessity be something of complication: for to the external action of the body or some part of

it must have been added an antecedent act of the will; an internal act, but for which it would have been on the footing of those motions which are exhibited by the unanimated and even by the unorganized ingredients in the composition of such parts of the world as are perceptible to us.

An internal act may, on the other hand, be of the simplest kind, unattended by any motion on the part of any portion of matter exterior to the individual whose act it is.

It being understood that it is to the mind that it is ascribed and attributed, the term motion may still be employed in the designation of it, although, in what happens in the mind upon the occasion in question, no change of place can be observed: for, in speaking of what passes in the mind, we must be content, for the most part, to employ the same language as that which we employ in speaking of what passes in and about the body, or we could not in any way make it the subject of discourse.

### III. *Distinction the third.* Facts positive and negative.

In this may be seen a distinction, which belongs not, as in the former case, to the nature of the facts themselves, but to that of the discourse which we are under the necessity of employing in speaking of them.

In the existence of this or that state of things, designated by a certain denomination, we have a positive, or say, an affirmative fact: in the non-existence of it, a negative fact.

But the non-existence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact: and unless this sort of

relation be well noted and remembered, great is the confusion that may be the consequence.

The only really existing facts are positive facts. A negative fact is the non-existence of a positive one, and nothing more: though, in many instances, according to the mode of expression commonly employed in speaking of it, the real nature of it is disguised. Thus, by *health*, is meant nothing more than the absence, the non-existence, of disease; by *minority*, the individual's non-arrival at a certain age; by *darkness*, the absence of light; and so on.

For satisfying himself whether, in the case of a certain fact, it is the existence or the non-existence, the presence or the absence of it, that is in question, the course a man may take is to figure to himself the corresponding image: he will then perceive whether, by the expression in question, it is the presence or the absence of that same image that is indicated and brought to view.

## CHAPTER IV.

### OF THE SEVERAL SPECIES OR MODIFICATIONS OF EVIDENCE.

Of evidence, as of any other sort of thing, the number of *possible* species has no other limits than what are set by the number of points of difference observable by the human mind, in the several individual objects, for the conjunct designation of which, the generic term in question is employed.

Of the species or modifications of evidence actually distinguished in the course of this inquiry, and, for the purpose of it, designated, each of them, by its appropriate name, it may be of use to give a simultaneous intimation at this early stage.

In the present work our concern is chiefly with judicial evidence. With regard to evidence in general, as contradistinguished from judicial evidence in particular, only one distinction shall be brought to view in this place. Such others as may hereafter become needful, will be noticed as the occasion shall arise.

The evidence by which, in any mind, persuasion is capable of being produced, is derived

from one or other or both of two sources: from the operations of the perceptive or intellectual faculties of the individual himself, and from the supposed operations of the like faculties on the part of other individuals at large.

For distinction's sake, to evidence of the first description, the term evidence *ab intrâ* may be applied: to evidence of the other description, evidence *ab extrâ*.

The modifications of which evidence *ab intrâ* is susceptible, are, perception, attention, judgment, memory: imagination, a faculty little less busy than any of the others, and but too frequently operating in the character of a cause of persuasion, being excluded, as not appearing capable of being with strict propriety ranked among the modifications of evidence.

Evidence *ab extrâ* has place, in so far as the persuasion has its source or efficient cause in the agency of some person or persons other than he whose persuasion is in question.

The sort of agency from which such persuasion is derived, is either *discourse* or *deportment*.\*

So much for evidence in general. We have now to notice the several species into which we shall have occasion in the sequel to consider judicial evidence as divided.

Of evidence, as of every other sort of thing, the aggregate mass, considered as a whole, may, in idea, at one division, be divided into two or any greater number of parts, in any number of

\* Discourse comes mostly under that sort of evidence which there will be occasion to distinguish by the appellation of *direct*: deportment, serving or contributing to produce persuasion, but not operating in the way of discourse, belongs exclusively to the class of circumstantial evidence. See Book V. CIRCUMSTANTIAL.

different directions, by divisions taken from so many sources of division : just as a field may be divided into two parts any number of times, each time by a line drawn from any point in any one of its boundaries to a different point in any other of its boundaries. So many different points to or from which the division is made, so many different sources of the several divisions thus made.

In the determination of the species of judicial evidence of which there will be occasion to make mention, in the course, and for the purpose, of the present work ; the following are the sources of the principal divisions, of the first order, that have been made.

1. Source of division—nature of the source of the evidence. The species which are the result of the division made in this direction and from this source, are, personal evidence, and real evidence. *Personal* evidence, that which is afforded by some human being—by a being belonging to the class of persons : *real* evidence, that which is afforded by a being belonging, not to the class of persons, but to the class of things.

2. Source of division, in the case of personal evidence,—state of the will, in respect of action or inaction, on the occasion on which it issues from that its source. Species resulting from the mode of division deduced from this source, —voluntary personal evidence, and involuntary personal evidence.

Voluntary personal evidence may be termed, all such evidence as is furnished by any person by means of language or discourse; or by signs of any other kind, designed by him to perform the function, and produce the effect, of discourse.

*Testimonial* is the term by which evidence of this description will henceforward be designated.

To the head of *involuntary* personal evidence may be referred all such personal evidence as, being the result, sign, and expression, of some emotion, is exhibited not only not in consequence of any act of the will directed to that end, but frequently in spite of the will and every exertion that can be made of it. To this head belong, for example, all involuntary modifications of which the deportment, and all involuntary changes of which the countenance, is susceptible.

3. Being in both cases personal and voluntary, and thus testimonial, the lot of evidence in question may either have been brought into existence on the occasion of the cause in which it is exhibited, or otherwise than on the occasion of the cause. Source of division, in this case,—relation of the evidence in question, at the time of its coming into existence, to the cause, on the occasion and for the purpose of which it is produced. Species of evidence deduced from this division,—depositional testimonial evidence, and documentary evidence.

4. The signs by which, at its coming into existence, the article of evidence in question, being depositional testimonial evidence, stands expressed,—may be either of the evanescent kind (such as sounds, and those visible signs which through necessity are sometimes employed instead of these audible ones), or permanent, such as written or printed words or figures. Source of division,—nature of the signs employed for the delivery (viz. the original delivery) of the testimony. Species of evidence deduced from this division,—oral

or orally-delivered depositional testimony, and scriptitious or scriptitiously delivered depositional testimony.

5. In the case of testimonial evidence, the subject of the testimony is either the very fact, the existence or non-existence of which is the principal matter of fact in question, or some fact which, though distinct from it, is considered as being *evidentiary* of it. Source of the division in this case,—identity or diversity of the matter of fact, asserted by the deponent in the instances in question, with the principal fact in question in the cause. Species which are the result of the division made in this direction and from this source,—*direct* evidence, and *circumstantial* evidence.

All evidence which comes under the description of real evidence, is circumstantial evidence.

6. Of the lot of testimonial evidence in question, the trustworthiness or legitimately probative force will depend upon the number and efficiency of the several securities for correctness and completeness that have been or can be brought to bear upon it. If, in the instance in question, the list of these securities be complete, the article of evidence may be said to be in an ordinary degree trustworthy, and may be termed ordinary evidence: if any one or more of these securities be wanting, it will be in an inferior degree trustworthy; and, however different from one another in all other respects, the several species of evidence that agree with one another in this particular may be comprehended, any or all of them, under the appellation of *makeshift* evidence.

7. Whatever written evidence is adduced on the occasion and for the purpose of the cause in question, was, at the time of its being brought into existence, created either *with* the design of its being employed on the occasion and for the purpose of a cause or suit, or *without* any such design. In the last case it may be termed casually-written evidence. To this head belong private letters and memorandums. If created with the design of being employed in a cause or suit; it either was intended to be employed on the occasion and for the purpose of some *determinate* and *individual* cause or suit, or else to be eventually employed on the occasion and for the purpose of *some* suit or cause of this or that particular species, but *not* individually determined. Source of the division in this case,—determinateness or indeterminateness of the suit or cause, for the purpose of which, the article of evidence in question, being of the written kind, was brought into existence. Species which are the result of the division made in this direction and from this source,—unpreappointed written evidence, and preappointed evidence.

Thus, the affidavit of a witness, delivered in the usual way, on the occasion of a cause of any kind in which that sort of evidence is admitted, is unpreappointed evidence; since it is created with a view to be employed on the occasion and for the purpose of this particular cause. But a deed of conveyance of an estate is preappointed evidence; for it is created for the purpose of being eventually employed in *some* suit or suits, should any such happen to arise, but it is *not* created with a view to any *determinate* suit;

since, at the time when it is created, it is as yet uncertain whether any suit of the particular kind in question will ever arise or not.

8. The evidence being testimonial; source of the division,—identity or diversity, as between the *narrating* or *deposing* witness and the alleged and supposed *percipient* witness. Species of evidence deduced from this source,—original evidence, and unoriginal evidence.

The evidence may be termed *original*, when the depositing witness,—the witness by whom, for the information of the judge, a statement is made concerning the matter of fact in question,—was the very person to whose senses the matter of fact in question did, at the time and place in question, in so far as such his deposition is true, present itself.

The evidence may be termed *unoriginal*, in so far as the narrating witness in question speaks of some *other* person, and not of himself, as the person to whose perceptive faculty the supposed matter of fact in question did, at the time and place in question, present itself.

## CHAPTER V.

### OF THE PROBATIVE FORCE OF EVIDENCE.

#### SECTION I.—*Ordinary degree of probative force, —what.*

OF the several objects that come within the present design, the first being the *prevention of deception*, I proceed to take a concise view of what may be proper to be done for the production of a result so essential to justice.

Deception is a relative term: judgment, regarded as false, is so regarded with relation to some other judgment taken as a standard; which standard, by the unalterable constitution of the human mind, and of the language by which its perceptions are undertaken to be expressed, can never be other than the judgment of the individual by whom the term *deception* is employed.

A mass of evidence being produced on the plaintiff's side of the cause; and on the defendant's, no matter whether a mass of counter evidence or none (say to simplify the matter, none); the judge, grounding on this evidence his decision, so far as the question of fact is concerned, decides in favour of the plaintiff's side.

Taking note of this decision, and of the evi-

dence on which it was grounded ; the judgment or opinion delivered by me on the subject is, that, in this instance, *deception*, with the mis-decision that has followed upon it of course, has had place.

Developed, my opinion, as expressed above, will be found to amount to this : of the body of evidence collected by the judge, the *probative force* is not, in my opinion, great enough to warrant the conclusion he has drawn from it; to wit, a conclusion, expressing his belief of the existence of the matter of fact undertaken on the plaintiff's side to be proved, viz. by the delivery of this body of evidence.

In this opinion of mine, thus declared, it is assumed and implied, as a notorious matter of fact, —that the quality by which testimony or other evidence delivered by an individual in relation to a matter of fact, produces, on the part of another individual, a belief of the existence of that matter of fact, is susceptible of degrees in point of *quantity*: that in my own mind the quantity of this quality was not sufficient to produce that effect which it produced on the mind of the judge: and this being the case, it is impossible for me not to regard the judge as having, in respect of such his opinion, been deceived.\*

The quantity of probative force incident to a body of evidence, is manifestly, as above ex-

\* On an occasion of this sort, the ultimate standard of rectitude can no more be exterior to the mind in which the opinion declared is formed, in the case of the most diffident, than in the case of the most confident, of mankind. Instead of taking my own view of the matter for the ground of the opinion so declared by me, suppose me to take that of Hypocrito, the judge of appeal, superordinate to the judge first

plained, susceptible of degrees: and what is equally manifest, is, that, to warrant a decision conformable to the tendency of the evidence, it is not necessary that the probative force of it should in every instance be at the highest degree.

To form, for the purpose of discourse, a nominal standard of comparison; let us take a mass or lot of evidence, of such a description, as, in the judgment of the ordinary run of mankind, is found sufficient, (if not contradicted or otherwise counter-evidenced,) to produce a belief of the existence of the matter of fact which it asserts: and this mass of evidence, let it be the deposition of an individual taken by lot, and unknown to the judge; the witness who thus *deposes* asserting, that, in the situation of *percipient* witness, the matter of fact presented itself, under the circumstances stated by him, to the cognizance of his senses.

Let us call the probative force possessed by an article of evidence of this description, the *ordinary* degree of probative force.

What is manifest to every man is, that, by evidence of this description, belief is frequently, indeed most commonly, produced; and that, in the greatest number of cases, of the belief so produced, right judgment, and not deception, is the consequence.

Unfortunately, what is equally notorious, is, that, of belief thus produced, deception is but too frequently the consequence.

In another case, in which the quantity of spoken of: the opinion of Hypercrito is the standard of rectitude, so far as assumed by me for that purpose: but, in pronouncing that the opinion, whatever it may have been, pronounced by Hypercrito, is right, my judgment has not assumed any standard of rectitude exterior to itself.

probative force has been, to a certain degree, greater than it was in the one first mentioned, deception has not been so frequently the consequence.

Here then we have an assumed nominal standard of comparison for the probative force of evidence: a lot that comes up to this standard, but does not rise above it, is what is meant by an ordinary mass or lot of evidence: a mass or lot that is considered as rising above it, may be termed a mass or lot of superordinary or superior evidence: any mass or lot that is considered as falling short of it, may, in like manner, be termed a mass or lot of infra-ordinary or inferior evidence.

The greater the quantity of probative force in the mass of evidence produced on one side, deduction made of that which is produced on the other side; the more certain in the eyes of a bystander will be its effect on the mind of the judge, and the greater in the mind of the judge will be the ease and satisfaction with which the judgment of belief pronounced on the strength of it will be accompanied.

As it is the business of the legislator so to order matters that, on each occasion, the obtainable quantity of probative force shall be as great as possible; so it is the business of the judge to be aware of all the several circumstances by which that quantity is capable either of being augmented or diminished.

## SECTION II.—*Probative force, by what circumstances increased.*

A quantity of probative force being thus marked out for a standard, let us proceed to

observe by what circumstances that quantity is capable of receiving increase and decrease.

1. One source of increase is derived from the *quality* of the supposed *percipient* or observing witness, thus standing forth in the character of a *narrating* or *deposing* witness. In the case of that witness, the probative force of whose testimony was assumed above as the standard quantity, the deponent was taken from the middle rank or level, in respect of the qualities, moral and intellectual, the union of which is necessary to trustworthiness. But, suppose that this or that visible situation or station in life, (whether constituted by opulence, rank, power, or official function, or any combination of these circumstances) is by general experience found to render a man less apt, on the sort of occasion in question, to deliver a statement in any respect incorrect or incomplete, than a man of a different condition, inferior or even superior, it is not at present necessary to determine which:—here, viz. in the *quality* or *condition in life* of the person, (the narrating or deposing witness), we see one source from which the probative force of an article or mass of evidence may receive increase.

To this head belongs, and on this ground stands, whatever superior degree of credence has in practice been, or may with propriety be, given, to *official* evidence in general, or to the testimony of persons invested with judicial offices in particular.\*

\* Unless it be a superior presumption of non-exposure to the seductive influence of sinister interest.

Persons to whose testimony, in consideration of the offices occupied by them respectively, a superordinary quantity of probative force is attributed, being placed in those offices by

2. Another, and a much more distinct and unquestionable, source of increase, is that which is derived from the *number* of the witnesses. Here the mode of the increase being of the utmost possible simplicity, the degree of it is susceptible of mensuration, with that exactness which is the exclusive property of mathematical operations. To the testimony of what number of ordinary witnesses, the testimony of what lesser number of super-ordinary witnesses, shall, in respect of probative force, be equivalent; it may not be easy, or indeed possible, to determine. But take the witnesses from either, or from any other level, (it being the same for all of them), the increase which the aggregate probative force of the whole mass will receive from the increase of the number, will be always determinable with mathematical exactness.

Suppose that,—instead of operating all on one and the same side, viz. in proof of the fact in question—the respective testimonies of a number of witnesses, all of the same level, are divided, some operating in proof of the fact, others in disproof of it: in this case, the mode of measuring the probative force will be nearly as simple, and altogether as certain, as in the former. In the former it was the *sum* of the testimonies that was taken, in this the *difference*.

3. Number of the witnesses, and a more than ordinary degree of presumable trustworthiness

appointment, and that appointment previous to the point of time at which it happens to them to deliver such their testimony; testimony of this description will be among the species of evidence to be spoken of under the head of *pre-appointed* evidence.—See Book IV. PRE-APPOINTED. Chap. 7. OFFICIAL EVIDENCE.

on the part of those witnesses respectively, are not the only sources of increase to the probative force of a mass of evidence. Another quarter from whence it is capable of receiving increase, and to an indefinite amount, is evidence of that sort which may be termed *real evidence*: evidence of which some object or objects belonging to the class of *things* is the source.\*

### SECTION III.—*Probative force, by what circumstances diminished.*

Circumstances, the tendency of which is to diminish the probative force of testimony, may be distinguished, in the first place, into such as regard the *source* of the testimony, such as regard the *shape* in which it is delivered, and such as regard the remoteness of the testimony, as delivered, from the supposed seat of perception.

#### I. Circumstances regarding the source of the evidence.

The trustworthiness of a person, considered at once in the character of a supposed *percipient*, and, as such, in that of an actually *deposing witness*; in other words, the probability of *correctness* and *completeness* in his testimony; and thence its probative force; is liable to be diminished by an imperfection in the *intellectual*, or by an imperfection in the *moral* or *volitional* part of his frame. Imperfections in the intel-

\* Of this, particular mention will principally be made, under the head of Circumstantial Evidence. As to written evidence, it is nothing but personal, delivered through the medium of real evidence.

lectual part may be comprised under the head of *imbecility*, or intellectual weakness: and these apply to him in both the above characters, viz. that of a supposed *percipient*, and that of a *narrating* or *deposing* witness.

Of the circumstances tending, as above, to diminish the probative force of a man's testimony, those which regard the volitional or moral part of his frame operate by their tendency to produce, on the part of his testimony, in the character of a narrating witness, a disposition to incorrectness or incompleteness.

Of these, such as tend to operate in that direction upon his will in the character of motives, are referable to the head of *interest*, viz. *sinister interest*:\* such as tend to dispose him to yield to the force of interest acting in that *sinister direction*, are referable to the head of *improbability*.

When, the deposition of the witness being considered as either incorrect, or, as to material circumstances, incomplete, he is considered as being, at the time of his delivering it, conscious of such its incorrectness or incompleteness; such incorrectness or incompleteness is said to be the result of, or accompanied by, *mendacity*; which, according as the ceremony of an oath happens to have been applied or not, is or is not converted into *perjury*. Where, though produced by the action of sinister interest, he is

\* Interest should to this purpose be understood in its largest and most comprehensive sense: viz. as including, not only self-regarding interest, but the interest constituted by sympathy or antipathy, as towards any other persons, taken individually or in classes.

considered as not being conscious of it, the imperfection is said to have *bias* for its cause.

II. Circumstances regarding the *shape* of the evidence.

By the *shape* of the evidence or testimony, I understand the *form* or *mode* in which it is delivered on the part of the witness, received or extracted on the part of the judge.

On looking over the practice of nations and judicatories (not to speak of families) in this view, a variety of operations may be observed as having been employed in the character of *securities* or *tests*, applied to the testimony so delivered on the one part, so received or extracted on the other; *securities* for the purpose of increasing the probability of correctness and completeness on the part of the testimony, before or during the delivery of it; *tests*, as assisting the judge in forming his judgment concerning the correctness and completeness of it, during and after the delivery of it.

Of these securities or tests, the assortment employed on each occasion constitutes the *shape*, the *form*, the *mode*, in which on that occasion the testimony is delivered, received, extracted.

In the list of them some little difference is liable to be made by a corresponding difference in the nature of the case. This noted; any case being given, the union of the several securities, as above, applicable with advantage to that case, will constitute the *shape most proper* to be given to the evidence in that case: and, so far as *shape* is concerned, the non-application of any one of them, yet more of any greater

number, or the whole number, of them, will have the effect of denominating the evidence an *inferior* sort of evidence: a sort of evidence, the probative force of which has, by the operation of that deficiency, suffered a *decrease*.

So far as the nature of the case (meaning in each instance the individual case) is such as to render the application of the several securities practicable; so far the degree of probative force given to it depends upon the will, and is at the option, of the legislator; or, under unwritten law, of the judge, in his disguised, but not the less real, character of legislator.

The person, who is the source of the evidence in question, being forthcoming, or in some other way accessible and justiciable; it depends upon the legislator, and upon the judge as legislator, whether to receive or call for his testimony under the securities afforded by oath and examination together (as before a jury), or without either (as in case of common law pleadings), or under oath without examination (as in case of affidavit evidence), or under examination without oath; and the examination performed either in the oral mode, as in jury trial, or in the epistolary mode, as in the case of a *bill in Equity*.

### III. Remoteness of the testimony, as delivered, from the supposed seat of perception.

In the case of the above supposed standard lot of evidence, the testimony or statement of the fact was delivered to the ear or the eye of the judge in an immediate way, from the mouth or the pen of the deponent by whom, in the character of a percipient witness, the fact was supposed to have been observed. But, between the mouth of the percipient witness and the

ear of the judge, any number of mouths may have intervened; of which that one, by which the statement was conveyed, without the intervention of any other, to the ear of the judge, is the mouth of the deposing witness. For every one of these intervening mouths, the evidence, it is manifest, cannot but lose a proportionate share of its probative force. In like manner, between the pen of a percipient witness and the eye of the judge, may intervene any intermediate number of pens. Like loss of force for every intervening pen as for every intervening mouth; though not in equal degree from the intervention of pens, as from the intervention of mouths.

As mouths may succeed mouths, and pens pens, so may mouths and pens succeed one another in every variety of alternation. To these varieties correspond so many specific modifications of the genus of transmitted or transmissive evidence: modifications, some of which, being noticed in practice, require distinctive names.

A circumstance that contributes in a principal degree to the diminution of probative force, that takes place in the case of transmitted evidence, is, that the factitious securities, applicable to the testimony of the deposing witness, do not reach nor apply to the station of the percipient witness.

It often happens that the very fact in question has not fallen within the reach of human perception or observation. In this case, the judge is left to infer the existence or non-existence of it, from the ascertained or supposed ascertained existence or non-existence of some other fact or facts, so connected with the existence or non-

existence of the principal fact, as to be considered *evidentiary* with relation to it; *i.e.* as serving to prove to us the existence of it; to persuade, to satisfy us of the existence of it, with an indefinitely variable degree of force. Evidentiary facts, thus connected with the principal fact constitute what, in the language of jurisprudence, is called *circumstantial* evidence.

In this denomination may be seen an appellation familiar, in the language of England, to lawyers, and even to non-lawyers, but not so in the language of any of the nations trained up under Roman law.

The species of evidence designated by this appellative, agrees in one respect with the above-mentioned modifications of *unoriginal* evidence, viz. in respect of remoteness from the source. In every instance, the image presented by it is the image—not of the fact itself, which is in question,—but of some other fact, the tendency of which is to produce, or contribute to produce, a belief of the existence of such principal fact.

With few or no exceptions, all *real* evidence will be found to come under the head of *circumstantial*: but there is a species of evidence, which, though not properly testimonial, may yet, inasmuch as it has a person for its source, be called *personal*.\*

\* Any sort of circumstantial evidence, which, though it have for its source a person, serves not to convey any indication of his mind, may with more propriety be ranked under the head of real than of personal evidence: as, for instance, the appearance produced on the body of a man already dead, or still alive, by a wound, and considered as affording circumstantial evidence, indicative of the instrument or hand by which the wound was inflicted.

To this head may be referred *deportment*, and in some cases even *discourse*.\*

\* A person being accused of a crime of any sort, suppose him, for argument sake, guilty. On an occasion judicial or extrajudicial, he has joined with others in discourse, bearing in some way or other relation to the fact, the principal fact, in question. So far as what he says is regarded as true, it is of the nature of direct evidence, and comes under the denomination of confessorial evidence: so far as it is regarded as false, evasive, or in any other way tending to deception, it is of the nature of circumstantial evidence: falsehood, evasion, deception, or the endeavour to deceive, being so many evidences, presumptive evidences, of guilt, i. e. of the commission of the criminal act in question, whatever it be.—See Book V. CIRCUMSTANTIAL.

## CHAPTER VI.

### DEGREES OF PERSUASION AND PROBATIVE FORCE, HOW MEASURED.

**SECTION I.—***Importance of a correct form for expressing degrees of persuasion and probative force.*

PERSUASION admits of, and exists in, different degrees of strength, different degrees of intensity; for strength, force, and intensity, are here synonymous.

Of these differences, the practice of wagering affords at the same time a proof of the existence, and a mode of expression or measurement for the quantities or degrees: in which latter character it will claim, farther on, a more particular notice.

Another matter of fact not less notorious, is, that, by these theoretical differences and supposed degrees of difference, in whatever mode and with whatever degree of accuracy expressed and measured, human conduct is, on a variety of occasions, governed: instance once more the practice of wagering, and the various applications of the principles of insurance grounded on it.

Not only the persuasion of an ordinary man, on an ordinary occasion, but the persuasion of

a judge, on a judicial occasion, is capable of existing in different degrees of strength.

Whenever a fact comes in dispute, the belief of which on the part of the judge is necessary to produce and warrant such a decision as shall give effect to a right, the *first* object aimed at by the legislator ought to be, as already stated, so to order matters, that evidence of the highest possible degree of probative force, in proof of that fact, shall be forthcoming : the *next* object, that the judge may always form the same estimate of the probative force of the evidence, as the legislator would do if it were possible for him to take an estimate of it.

But every element of judicature is subject to variation in quantity and degree.

In the case of circumstantial evidence ; the probative force of the evidentiary fact, considered as indicative of the existence of the principal fact, (which is as much as to say the strength of the persuasion produced by it), is susceptible of every variety of degree in the bosom of the judge.

In the case of immediate testimonial evidence (setting aside the consideration of any supposed improbability of the fact stated, and any supposed imperfection in the disposition and character of the witness) the strength of persuasion on the part of the judge will be as the strength of the persuasion expressed on the part of the witness : which is, in other words, to say,—the probative force of the testimony delivered by the witness, will be exactly as, or rather will be the same thing with, the strength of the persuasion expressed by him in the delivery of it.

The strength of the persuasion expressed by the witness will, if clear of wilful falsehood, be (in so far as the means of discourse at his command admit of correctness) exactly the same in degree with the strength of the persuasion actually felt and entertained by him at the time.

But the strength of the persuasion so entertained by him is subject to be diminished in any degree by each of two causes: viz. 1. By weakness on the part of his percipient faculty, i. e. want of clearness and distinctness on the part of the conception formed of the fact at the time.—2. By weakness on the part of his retentive faculty; want of strength and distinctness on the part of the impression made on the memory by the first formed conception.

Of incorrectness in one quarter, error and consequent mis-decision in another is thus a natural result.

If on comparing together the testimonies delivered by a number of witnesses—say by *three* witnesses—it appears to the judge that they joined, all of them, in regarding the existence of the fact as more probable than the non-existence of it; whereas, in truth, the force of the persuasion, when thus compounded together, lay not on that side; here an instance of misdecision will have taken place on the part of the judge; and no worse could have happened, had these testimonies been none of them forthcoming, or had they all, after joining in a tale of wilful falsehood, obtained credence for it as if it had been true.

In what has been already said, reason will probably be seen for regarding a correct mode

of expressing degrees of persuasion and probative force as an object of no inconsiderable importance; and the further we go into the examination of the subject, the clearer will be the light in which the importance of it will present itself.

Unfortunately, the language current among the body of the people is, in this particular, most deplorably defective. I know—I believe. The fact happened so and so—I believe it happened so and so: and there the gradation ends.

Among men of law, to whichsoever of the two great schools of law belonging, nothing better is to be found.

The language of mathematicians will be seen to afford two different modes or principles.

One is perfectly correct: it is the mode of expression used in speaking of the doctrine of chances. But unfortunately it will be found not applicable to the present purpose.

Another, as applied to the present purpose, will be found incorrect. It is that which, assuming the greatest possible quantity to be a finite quantity, proceeds to divide it into parts: as a circle, which, how small soever, constitutes a whole, has, according to the usage of mathematicians, been divided into 360 degrees. Happily, incorrect as it is, its incorrectness will not be found attended with any practical inconvenience: since, on each occasion, whatever degree of correctness can on that occasion be of any use, can always be attained.

In truth, between infinite and finite, there is no medium; between the one mode and the other, there is accordingly no alternative. Of that mode which considers the greatest possible degree of

probative force as being (what it really is) an infinite quantity, it will be seen that it is altogether inapplicable to the purpose of judicial decision: there remains, therefore, as the only mode applicable, that which considers it as a finite quantity, having the number of its parts limited and determinate.

Suppose a number of witnesses deposing to the principal fact in question, in the way of direct evidence, there being no need of any such inference as has a necessary place in the case of circumstantial evidence; and suppose, moreover, that no doubt has place in the mind of the judge respecting the character and disposition of any of those witnesses; whatsoever be the aggregate force of persuasion entertained by all those witnesses put together, such, of course, will be the strength of persuasion on the part of the judge.

Conceive the possible degrees of persuasion, positive and negative together, to be thus expressed:

The degrees of positive persuasion—persuasion affirming the existence of the fact in question—constitute one part of the scale, which call the positive part.

The degrees of negative persuasion—persuasion disaffirming or denying the existence of the same fact—constitute the other part of the scale, which call the negative part.

Each part is divided into the same number of degrees: suppose ten, for ordinary use. Should the occasion present a demand for any ulterior degree of accuracy, any degree that can be required may be produced at pleasure, here, as in other ordinary applications of arithmetic, by

multiplying this ordinary number of degrees in both parts by any number, so it be the same in both cases: the number *ten* will be found the most convenient multiplier. In this case, instead of 10, the number of degrees on each scale will be 100 or 1000, and so on.

At the bottom of each part of the scale stands 0: by which is denoted the non-existence of any degree of persuasion on either side: the state which the mind is in, in the case in which the affirmative and the negative, the existence and the non-existence of the fact in question, present themselves to it, as being exactly as probable the one as the other.

Such is the simplicity of this mode of expression, that no material image representative of a scale seems necessary to the employment of it.

The scale being understood to be composed of ten degrees—in the language applied by the French natural philosophers to thermometers, a *decigrade* scale—a man says, My persuasion is at 10 or 9, &c. affirmative, or at 10 or 9, &c. negative: as, in speaking of temperature, as indicated by a thermometer on the principle of Fahrenheit, a man says, the mercury stood at 10 above, or at 10 below, 0.

If ulterior accuracy be regarded as worth pursuing, to the *decigrade* substitute (giving notice) a *centigrade* scale: and if that be not yet sufficient, a *milligrade*.

Three persons make their appearance in the character of witnesses in relation to the existence of the same fact: an option is given to them of three declarations, of which, one or other, in the instance of each witness, it is evident can-

not but be true, viz.—1. I believe the fact exists—2. I believe the fact does not exist—3. I am unable to form any belief concerning the fact, whether it does exist or does not. Being asked, each of them, what number of degrees in the scale comes nearest to expressing the strength of his persuasion, it being, as already declared by each, on the affirmative side; they answer by indicating, each of them, the same number—number 1.

In these three instances, the force of persuasion is at the least amount at which it can stand on either side.

Take now, in relation to the same fact, two other witnesses; and in the instance of each of them let the force of persuasion be at its maximum, represented as above by the number 10.

Of these two witnesses the persuasion may be on the same side as that of the three witnesses; or it may be on the opposite side.

Suppose it on the opposite side, viz. the negative. Out of 30 degrees of persuasion which the three witnesses might have had, they have but 3: while of the 20, the utmost number which the two were capable of having between them, they have the whole.

Observe now the variation which the decision of the judge must experience, according as he has or has not the means of hearing and noting down the differences which are in every instance liable to have place in regard to the quantum of persuasion on the part of witnesses.

If, as hitherto, these differences are unascertainable (the indications afforded by character and by probability being by the supposition out of the question), the judge can do no otherwise

than decide according to the number of the witnesses,—according to the difference between the numbers on each side : his decision will be—*the fact does exist.*

If, being ascertainable, these differences are ascertained, as above ; the force of persuasion on the part of the witnesses on both sides taken together, being now his guide, and beyond dispute his proper guide, his decision will be,—*the fact does not exist.*

Thus much as to the station of witness : let us come now to the station of judge.

Casual modifications apart, the persuasion of the judge has for its efficient cause the persuasion of the witness : persuasion on the part of the public at large has, for its efficient cause, the persuasion of the judge.

But among three, and even as far as nineteen witnesses, in relation to the same point, the aggregate force of persuasion, it may easily happen, shall be less than among two witnesses.

In like manner among three, and even as far as nineteen judges, in relation to the same point, the aggregate force of persuasion may be less than of two other judges.

For want of an adequate mode of expression, the real force of testimony in a cause has hitherto been exposed to perpetual misrepresentations.

For want of an adequate mode of expression, the real force of judicial opinion and authority in a cause has, in like manner, been hitherto exposed to similar misrepresentations.\*

\* In the history of English judicature, an instance is upon record, in which a jury, finding a difficulty in settling the degree of their respective persuasions, sought for their consciences a relief, which, by men of hardened consciences, was

Of a scale of this sort, supposing the use of it allowed, five things it should seem might be predicated, viz.—

1. That when employed it would be employed without confusion, difficulty, vexation, or other inconvenience in any shape.
2. That, at first, more especially, it would not however be in frequent use.
3. That, by degrees, as the human understanding improved, the use of it would become more and more frequent.
4. But that at no time would the number of occasions calling for it (*i. e.* the number of the occasions on which, for the purpose of giving a correct expression to the degree of persuasion felt by him, the individual felt the need of such an instrument) be very considerable.
5. That, the greater the importance of the

imputed to them as a crime. The verdict, the result of the aggregate of their persuasions, was left to the decision; of cross and pile. The verdict was set aside, and those who pronounced it (if I mistake not) were punished.

The state of their minds is sufficiently declared by this their act. In one thing they were agreed, viz. in finding themselves under an incapacity of forming a persuasion, an opinion, either on one side or the other. They accordingly referred the matter to a more competent judge, viz. as some would say, to Chance, as others would say, to Providence. They would not profess themselves able to form an opinion when in truth they were not.

An expression of sincerity so decided and so novel was not to be endured by a set of men among whom the expedient of employing torture to force men to declare as their own, opinions opposite to their own, has been established in the character of a practice indispensably necessary to justice.

To a class of men by whom, in their own instance, sincerity has been cast off as a habit incompatible with profession and with office, every symptom of sincerity in others would, of course, be matter of ill-will and jealousy.

cause, the more likely would the instrument be to be called into use.

Being altogether optional, all possibility of vexation is, by that circumstance, excluded from the use of it.

Everything of difficulty and confusion stands equally excluded : a man will not call for the scale unless he knows perfectly well how to use it, and it seems not easy for a man not to know. If he makes no use of the scale, the effect of his testimony or his suffrage is as if he had placed the index at No. 10, the highest degree in the scale : if it be his desire to make use of the scale, he places the index at No. 9, or any lower number, as he pleases.

The use of it, says the third observation, would be gradually more and more frequent.

Increased correctness, in effect, is the natural result of increase of attention: in proportion as the attention of man fixes itself closer and closer to any subject, advancement in science, as well as increased correctness in art and practice, gradually creep on. It is by increased closeness of attention that discoveries are made, and advances effected, in every path of art and science.

Old measures of every kind receive additional correctness; new ones are added to the number: the electrometer, the calorimeter, the photometer, the eudiometer, not to mention so many others, are all of them so many productions of this age. Has not justice its use as well as gas?\*

\* In the present instance, the seat and station of improvement, if the idea have any title to that name, is in language; but language, though itself the instrument of all other im-

## SECTION II.—*Application of the principle to different cases in Judicature.*

Strength of persuasion belongs to that class of *facts* which has already been distinguished

provement, and standing to the full as much in need of improvement as any other instrument, is in a more particular degree averse to improvement; at least in those ponits of it which not belonging, or not appearing to belong, to the demeane of any particular art or science, are conceived to belong in common to the great body of the people. Chemistry, for example, having for its subjects a multitude of things with which none are conversant but those who have devoted themselves to the science; amendments of every kind, to that part of the language, are daily suffered, and received without murmur or repugnance. Not so in the case of morals: this is considered as common land, and every improvement is resisted as an encroachment: always excepted those productions of lawyer-craft which have been forced into the language of the law, beyond all power of resistance, by the combined force of coercive power and imposture.

In chemistry, the prodigious advances which the present generation has witnessed could not have been made, but for correspondent advances in the arts of method and expression—in the structure and composition of the correspondent part of the language.

This is not, by a good many, the first instance in which numbers have been employed for the designation of psychological quantities.

Among the first, if not the first of all, is that in which this mode of expression was employed by De Piles, for expressing the degrees in which, in his judgment, the several perfections desirable in a picture stand exhibited in the works of some of the most celebrated painters. These perfections being numerous, say a dozen; and the same number of degrees assigned to each, say twenty; here were twelve scales, with twenty degrees in each scale, ranged side by side, and all together constituting a sort of table.

Of the original idea thus exhibited, copies after copies have at different times made their appearance in newspapers, and other periodical publications. Amongst others I re-

by the name of *psychological facts*.\* Among the properties of the facts of this description, is that of not being indicated by direct testimony, other than that of the one individual in question: under that exception, not being indicated by other than circumstantial evidence.

Of a persuasion on the one side or the other, the declaration has on various occasions been rendered matter of obligation in legal practice. But as to the force or degree of persuasion, no distinction having ever been called for on any occasion, so accordingly not on this.

The fact of the existence of a persuasion on the affirmative side, or on the negative, has been considered as being, when untrue, susceptible of being disproved; and so thoroughly susceptible, that, in case of falsity, such falsity has been deemed, and in practice constituted, a ground for punishment. In every instance of the *crimen falsi*,—in every instance in which falsehood, howsoever expressed, whether by discourse or by deportment, enters into the composition of the offence,—such is the case: for a false assertion is the false declaration of a persuasion in relation to some fact or facts.

member seeing a tabular sketch exhibiting some of the most eminent characters amongst the judges and other lawyers of the day, with the degrees in which they were supposed to possess the several qualities which are considered as desirable in that line.

An indication given by a single judge, expressive of the degree of force with which his own persuasion applied itself to the existence of a particular fact that had presented itself to him for his decision, would be somewhat less invidious, and more useful, and would present a somewhat better title to confidence.

\* See Chap. III. FACTS.

On pain of eventual punishment, a man is thus continually called upon to declare persuasion, and punished in the event of his being deemed to have placed it on the wrong side of O. But even supposing the scale of persuasion in use, it would scarcely for a long time, if ever, be deemed consistent with justice to punish him on the ground of his being deemed to have placed his persuasion at a wrong point on the right side.

In case of adverse interest striving to produce deception, there appears therefore but little, if any, hope, that any considerable beneficial effect could be produced by an instrument of expression, the use of which is, in the respect in question, to put the means of correct expression in men's hands.

But, happily, instances are by no means wanting in which interest is neuter; insomuch that, whatsoever be the real force of a man's persuasion, it would be on the score of interest not disagreeable, and on the score of love of justice, and other social affections, positively agreeable, to make declaration of that in preference to every other.

In the intercourse of life, and for self-regarding purposes, nothing (as hath been already intimated), is more common than for men to give expression to the force of their persuasion; and upon a principle closely analogous, to the utmost nicety. *Wagering* in all its forms, whether in the way of sport, or in the way of business, under the guidance of forecasting prudence, has already been mentioned in this view.

Under the influence of a principle of action comparatively so faint, in the greater number

of minds, as the love of justice, or any other modification of the social principle; equal correctness cannot reasonably be expected, since attention equally close cannot reasonably be expected. But, that everything that could be wished cannot be obtained, is no reason why that which can be obtained, should, if useful, be neglected; and by the help of a scale of persuasion, as here brought to view, it is easy to see how high a degree of correctness might be attained in this particular, in comparison of everything that has been as yet exemplified.

Apply it first to the case of a witness.

At present, when a witness has delivered his evidence, if stated in a simple manner, without any expression of doubt, it is understood of course as being at its maximum. But, if any doubt or diffidence, anything tending, as supposed, to call upon the judge to make any defalcation from that maximum, is manifested; the subject is thereby thrown into a sort of confusion, in the midst of which, the language in use not affording a clue, the judge acts according to the humour or interest of the moment; and as the interest of the moment never fails to urge dispatch, chance, at the best, shares the decision of the cause with justice.

In the use of the instrument by which the point in the scale of persuasion is fixed, there need not be any greater difficulty than in the use of the dial-plate of a clock or watch, or the instruments respectively employed for reckoning at a game at billiards or a game at cribbage.

If the importance of the cause appear such as to pay for this small portion of vexation and

delay, the persuasive scale is presented to the witness, with liberty and discretion to place the index either at the highest point, if that be considered as the ordinary one, or at any inferior point by which, according to his own conception, the force of his persuasion may be more accurately designated.

Apply it now to the station of judge.

In this commanding station, men are without difficulty considered as exempt from, or proof against, the action of all sinister interest; proof, at any rate, against all temptation to any such mal-practice as that of misrepresenting their own opinions.

No objection, therefore, except to the novelty and utility of it, would, in the instance of judge, stand opposed to the taking a man's own account for the inward strength of his own persuasion, and reducing the outward effect of it to a conformity with the real state of it so declared.

If the effect of such a liberty were to augment his power, the objections would be insuperable; but a man may, without much danger, be trusted with the faculty of reducing it.

In this case, be it observed, the grant of this faculty need not be confined to the question of fact: the import, or state, of the law (the import of it if in the form of statute law, the state of it if in the form of judge-made law), constitutes a no less proper subject of *persuasion*—in a word, a no less proper subject of *opinion*—than the question of fact.

Under this general head, a variety of particular cases will exemplify the utility of this instrument of accurate judicature.

*Case 1.* Judges divers, and the number equally divided. In this case, the supposition acted upon is, that, on the part of every one of them, the force of persuasion was at the same pitch—on the part of each of them, at its *maximum*. The instrument employed, it would turn out perhaps that in each of them the force of persuasion was different; on one side or other an aggregate force of persuasion clearly preponderant.\*

*Case 2.* Appeal.—The decision become the subject of an appeal to an ulterior judicatory.

Not unfrequent are the occasions, on which, the real aggregate force of persuasion on the part of the original judicatory may, on just grounds, be taken into consideration by the ulterior judicatory. Suppose, for example, a question of fact, and evidence thereupon delivered *viva voce*. In some cases the testimony of the witness cannot be received in the oral form on any terms by the ulterior judicatory: at any

\* In a case considered as being of importance, in English practice, shades of difference in the form of persuasion on the part of this or that judge, have not unfrequently been endeavoured to be expressed in ordinary language: matter of vague dissertation, and sometimes of secret history.

Among the many and transcendent merits of lord chief baron Comyn's matchless Digest of the Law, is the attempt to express some of those shades. *Dub.* for *dubious*; *semb.* for *semble, it appears,*—are among these imperfect, but still useful, approximations.

Applied to the constitution of a jury, under which torture is applied to the purpose of forcing any number of the members, from one to eleven, to deliver persuasions opposite to their real ones; a nicety of the sort above proposed will be apt, in the eyes of an admirer of everything that is, to appear preposterous in the extreme.

rate, by the repetition, the colour of the evidence, especially so much as is afforded by *deportment*,\* is liable to be changed. To be informed of the impression made on the original judicatory by the same testimony, and in its freshest state, might, on such an occasion, be of considerable use.

*Case 3.* Pardon.—In a penal case, the judgment being a judgment of conviction, a question proposed is, whether the power of the sovereign shall be applied to the remission of it.

Among the most justifiable causes for the exercise of this power, is a doubt whether the defendant, who has been deemed guilty, as above, was really so.

Sometimes the cause of such doubt is to be found in some article of information subsequently brought to light, and, in the character of evidence, sufficiently established for this purpose. But at other times, the doubt has for its cause a doubt on the part of the judicatory: on the part of some judge or judges the persuasion entertained of the delinquency of the defendant not being at so high a pitch, as, to warrant an operation to such a degree afflictive, it is conceived it ought to be. Pardon or no pardon turning in this case upon the degree of persuasion on the part of each member of the judicatory, the importance of accuracy in the expression given to those several degrees is sufficiently manifest.

Even although the principle of judging from the aggregate of persuasion instead of the

\* See Book V. CIRCUMSTANTIAL.

number of persons persuaded, should not be adopted for judicial decision, it might for pardon.

*Case 4.* The same question moved elsewhere in another judicatory and in another cause.

So far as concerns the question of fact,—unless where, being considered as having received a decision in the antecedent judicatory, that decision is considered as conclusive,—the opinion of the members of any such antecedent judicatory is not usually taken for an object of regard.

But in so far as any question of law is concerned, great anxiety is commonly testified to learn with the utmost correctness the degree of persuasion entertained in such antecedent judicatory, supposing it not subordinate with relation to the judicatory now in question.

*Case 5.* Punishment or satisfaction to be administered *pro modo probationum*.

A topic this, which, though it be in the Roman school, and in particular in the French form of that school, that it has received a name, is in practice not altogether disregarded in the English school. Various are the instances, in which, a degree of probative force which would not be considered as sufficient to warrant conviction for the purpose of punishment, is considered, and not without reason, as sufficient to warrant a decision by which satisfaction, in some shape or other, is awarded. The only expression that can be given by a judge to the conception entertained by him of the degree of probative force appertaining to the evidence, being a declaration of the degree of strength of the persuasion of which it has been productive;

it seems sufficiently obvious how material it is to this purpose that a mode of expression, the most correct that the nature of the case admits of, should, on this occasion, be capable of being employed.

*Case 6.* Scientific evidence.—Scientific is the denomination that, for distinction's sake, may be given to the judicial declaration of a species of functionary, in whose function the character of judge is in some sort combined with that of witness. It comes to be exercised as often as,—for the guidance of the opinion of the regular judge in relation to some matter of fact, a just conception of which is considered as requiring some particular *skill*, such as falls not to the lot of all members of the community, nor in particular, unless by accident, to the lot of the regular judge,—the opinion of a person considered as being in an adequate degree possessed of the species of skill in question, is called in.

In the Roman school, this species of functionary is named by the judge, and treated on the footing of a sort of judicial officer acting under the judge.

In the English school, he is named by the party to whom it occurs to expect that an opinion extracted from that source will be serviceable to his side of the cause; and is treated on the footing of any other witness.

On whatever footing his opinion, in other words his persuasion, in relation to the matter of fact in question, is called in; it cannot be matter of doubt how beneficial it cannot but be to the interests of justice, that the means should be in his hands for giving to the expression of

the degree of force of his persuasion whatsoever degree of accuracy he thinks fit.

**SECTION III.—*Incapacity of ordinary language for expressing degrees of persuasion and probative force.***

Such, as above brought to view, are the advantages deducible from an adequate mode of expressing degrees of persuasion and probative force, supposing it to be found. If the current language were adequate to this purpose, there would be no need to look out for any other. That to this hour it remains as far from being so as it is possible for it to be, is perceived upon a general view at the first hint. But, by a particular observation or two, the nature of this penury may be rendered more distinctly perceptible.

In a word, the only adequate mode of expressing degrees of persuasion, is by *numbers*. But, hitherto, neither in ordinary language, nor in the scientific language of jurisprudence, have numbers been employed. The result, in point of imperfection and inadequacy, will be conspicuous.

*Persuasion*, the only term equally proper in all *cases*, that is, in all *degrees*, is accordingly the term that has all along been employed here.

*Opinion*, though in some cases capable of taking its place, is not synonymous to it; since opinion is scarcely considered as being, like persuasion, susceptible of degrees.

In addition to this term, which, comparatively

speaking, is not in very frequent use, come two others, both of them in perpetual use, viz. *knowledge* and *belief*.

In ordinary discourse, applied to ordinary topics, the word *belief* seems to be applied to designate *any* degree of persuasion; and accordingly it cannot be employed to designate any one, to the exclusion of any other.

Among religionists, applied to the topic of religion, it is employed to designate the very highest degree, and to the exclusion of every other; since it is not any inferior degree that will satisfy them.

Among lawyers, on the contrary, to wit among English lawyers, it has been employed to designate any inferior degree of persuasion, to the exclusion of the highest.

For giving expression to the highest, what they have declared themselves to expect, is, that a witness shall either employ the forms of naked assertion—such a thing is so and so—or introduce the word *knowledge*. *Belief*, in certain cases, they have admitted of, recognizing it as designative of an inferior degree of persuasion; but in other cases, in the character of an expression of the degree of persuasion, nothing will satisfy them but *knowledge*, a degree of persuasion above belief.

If your persuasion falls short of amounting to belief, the priest, so far as depends upon himself, consigns you to everlasting punishment in a life to come: \* if it fails of mounting above belief, the man of law, the judge, consigns you,

\* English Liturgy, Athanasian Creed, &c.

and in a manner more visibly efficient, to punishment in the present life.\*

Knowledge, with its logical conjugates, comprising the verb *to know*, not only expresses the highest degree of persuasion possible, but in some circumstances expresses that highest degree of persuasion as existing in two different minds at a time. If I say—I *know that London lies to the north of Paris*, I speak of my own persuasion only; but if I say—*You know that London lies to the north of Paris*, I speak of my own persuasion as well as yours; of yours alone expressly, but of my own by implication, and that a necessary one: for were my persuasion on the subject short of the highest point, the expression would be a contradiction in terms.

In this instance, as in so many others, the *indirect* mode of assertion has the effect of expressing a stronger degree of persuasion than can be expressed by the *direct*.†

\* Harrison's Chancery, i, 222. Rules and Orders of the Court of Chancery, p. 99, edit. 1739.—See *infra*, section 5.

† Thus, in the English language, the command intimated by that future which is expressed by the word *shall*, is more imperative, indicative of a stronger exertion of will, than the command expressed by the word *to* which alone the denomination of *imperative mood* has been commonly affixed by grammarians: the command expressed by *you shall pay me*, is more strongly imperative than the command expressed by the words *pay me*. By the imperative so called, nothing more is expressed than the bias given to the will of him who speaks. By the future above-mentioned, not only the existence of the will is denoted, but the futurity of the event which is the object of it, is predicted as certain; an intimation being moreover given of the event as being about to have for its cause the will that has been thus expressed. Such is the power of my will, that the event of which it seeks to be productive cannot fail of taking place.

In the language of English as well as other lawyers, a case is spoken of as *proved*—as fully proved. In regard to the state and degree of *persuasion*, and of the nature of the cause by which, on the part of the judge, it has been produced, what is understood by this expression? Answer:—that, the evidence being either direct, or, if circumstantial, of that sort which is commonly received either as an equivalent or as a necessarily receivable substitute to direct; the strength of persuasion expressed by it on the part of the witness is such as (it standing unopposed either by any objection, or at least by any preponderant objection, to the trustworthiness of the witness, or by any counter-evidence, or at any rate by counter-evidence of preponderant force) will naturally, on the part of the judge, be productive of such a degree of persuasion, in affirmation of the existence of the fact in question, as shall be sufficient to authorise and require a decision on that side.

In speaking of evidence as having been delivered in relation to the fact in question, suppose an occasion to arise for avoiding to pronounce decidedly concerning the direction or strength of the persuasion of which it may have been productive: in this case, instead of speaking of the fact as having been proved, the usage is to speak of it as having been attested, affirmed, or denied, in or by deposition or evidence.

#### SECTION IV.—*Roman school—its attempts to express degrees of probative force.*

The Romanists, in expressing their sense of the importance of giving correctness to the de-

scription tendered of the degrees of persuasion entertained in each case, betray, and in a manner confess, their incapacity of finding a solution for the problem thus proposed.

1. Full.—2. More than half-full.—3. Half-full.—4. Less than half-full.—Such, if Heineccius is to be believed, are the degrees of probative force that have been distinguished, and have received denominations, in his school of fraud and nonsense.\*

But of these distinctions the application is confined to the aggregate mass of evidence taken together: the mass produced on one side of the cause. They are not applied either to the force of persuasion on the part of the judge, or so much as to the probative force of the evidence of any one witness when considered by itself.

That they should have had any application to the probative force of the evidence of any witness taken singly, would indeed, according to the notion of that school, have been somewhat difficult: seeing that, according to what, by him, is given as the better opinion, the probative force of the evidence of any one witness, be he who he may, is equal to 0: insomuch that, of the party by whom any such article of evidence has been produced, and no more, the condition ought not to be better than if he had produced none at all.†

In the French form of the Roman school,

\* Elem. Jur. Civ. Pars IV. § 18.

† See Book IX. EXCLUSION. Part VI. *Disguised.* Chap. I. *Exclusion for want of multiplicity.*

The following is the passage from Heineccius:—“*Juris interpres probationem in plenam et minus plenam, et*

another scale of a somewhat different construction was in use, according to M. Jousse,\* in the particular case in which the cause was of that sort which, if decided against the defendant, subjected him to capital punishment, and, by way of preparation for that punishment, to torture.

1. Highest degree of probative force, the degree sufficient to warrant conviction.

2. Next highest, or second degree of probative force, the degree expressed by the words "*urgent and indubitable.*" The practical effect of this degree of probative force was sufficient to subject him to torture, with power to the judges to subject him to any punishment short of capital, if the torture, the object of which was to prevail upon him to confess whatever he was accused of, failed of producing that desirable effect.

3. Third degree of probative force; the degree expressed by the words *less than "most violent."* Practical effect, subjecting him to torture, but without any such power to the judges: the torture having, when the probative force was at this degree, and not above, a "purgative" quality; and that of so particular a sort, as to "*purge the proofs*" (what is meant is probably *to purge away the proofs*), whatever they may be, that have operated to his prejudice in such manner as to subject him to the torture.

*hanc iterum in semiplenā majorem et semiplenā minorem, dispescunt. Quamvis verius sit, juris Romani principiis, unius testimonium plane non admittendum esse, licet præclaro curiæ honore præfulgeat; adeaque non meliorem esse conditionem ejus qui semiplene, quam ejus qui nihil, probavit*"

\* Ordonn. Crim. p. 375.

**SECTION V.—*English school—its attempts to express degrees of probative force.***

1. Positive proof.—2. Violent presumption.—3. Probable presumption.—4. Light or rash presumption.—Such are the degrees of probative force that have been distinguished and denominated in the English school.

Such are the explanations that have been given as instructive by lord chief justice Coke,\* and accepted and passed off as such by Mr Justice Blackstone.†

At the head of this scale, under the appellation of positive proof, is designated direct evidence, however trustworthy the source: below it, circumstantial, however great its force: and to make the distinction so much the clearer, “violent presumption,” (we are told) “is many times equal to full proof”—“probable presumption hath also its due weight;”—“light or rash presumptions have no weight or validity at all.”

The degree of probative force indicated by the light or rash presumption of the English school, is thus exactly equal to that expressed by the half-full proof of the Roman school, each of them being equal to 0.

But the Roman school has risen to a pitch of accuracy by which the English has been left at a distance: the Romanists having a degree of force, which is less than equal to 0, and which, though incapable of producing, in the breast of the judge, any degree of persuasion whatsoever, is still probative force.

\* Coke Litt. 6.

† Bl. Com. iii. 371. chap. 23.

The scale thus exhibited is a scale of probative force abstractedly considered : considered without distinction made as to the quantity and composition of the evidence to which the probative force is considered to belong.

It has accordingly no connection with, or reference to, that other scale above mentioned, which is a scale of persuasion merely, and of which the degrees are two, and but two, expressed by the words *knowledge* and *belief*.

No such suspicion appears to have found its way into either of these learned bosoms, as that of a connection between any such objects as *persuasion* on the part of a *witness*, *probative force* on the part of his testimony, and *persuasion* on the part of the *judge*, all susceptible of variation on one and the same scale.

The observation of the connection between these clearly distinguishable, though so closely connected, objects, was, as far as it goes, an observation in psychology—an observation made of the invariably observable phenomena of human nature : and it is among the characteristics of technical law learning, as of Aristotle's system of dialectics, in which his system of physics was comprised, to look down with indignant disdain on the invariably observable phenomena of human nature.

In both instances, the notion entertained of science seems to have been that it was confined to words : that it consisted in a perpetual substitution of words to words : and that,—in addition to words,—ideas, clear and distinct ideas, were no better than an incumbrance.

1. Unqualified assertion. 2. Assertion qualified by the words “to his remembrance,” or,

“as he believeth.” Such are the forms of speech devised by the earl of Clarendon when chancellor of England, for expressing two degrees of persuasion, which it seemed necessary to him to distinguish.\*

This second or inferior degree of persuasion is the degree which he permitted to be expressed in the case of a defendant interrogated by an instrument called a *bill in equity*, as to a matter charged as his [the defendant’s] own act, in any other case than “if it be laid to be done within seven years before ;” not saying before what, but probably enough meant to designate the day on which the matter of the written instrument met his eye.

But if it be laid to be done within seven years before, then it is that the proposed respondent must (on pain it should seem of being punished, if he persists, for *contempt*, as having put in an insufficient answer) take care not to suffer to stand as part of his answer either of those forbidden forms of speech; “unless the court, upon exception taken, shall find special cause to dispense with so positive an answer.”

The circumstance by which, on this occasion, the attention of this learned person appears to have been engrossed, is the distance in point of time : among the circumstances that appear to have escaped it, are, the importance of the fact (regard being had to the situation and character

\* Rules and orders of chancery, as published by the lord chancellor Clarendon, and the master of the rolls sir Harbottle Grimstone, without date, but at a period immediately preceding the 27th Feb. 19 Car. II. 1667 : p. 99, edition of 1739 : and quoted as subsisting in Mr. Parker’s edition of Harrison’s Practice of the Court of Chancery, 8th edit. 1796.

of the deponent), the differences of which that importance is susceptible, and the influence of these differences upon the memory. Another consideration, alike overlooked, seems to have been the influence of time of life upon memory, and the difference in this respect between immaturity, maturity, and caducity.

But the faculty of having recourse to the wisdom and justice of the court "*upon exception taken,*" presented a solution for every difficulty, a remedy for every inconvenience: a faculty which, to the merit of being to the suitor a source of relief, added the much superior, though so little published, merit, of being, to the judge, his friends, and dependents, a source of fees.

On the present occasion, however, the mode of constructing the scale, and giving denomination to the degrees of which it is composed, constitute the proper subjects of consideration: not the application or applications made of them.

"You shall swear that what is contained in this your answer, so far as concerns your own acts and deeds, is true, and that what relates to the acts and deeds of any other person or persons, you believe to be true. So help you God." (Before commissioners). Such is the form of the oath at present exacted of a defendant in an equity court, or, at any rate, on the equity side of the court of exchequer.\* Of two things, one: either there is something in the air of the court of exchequer that strengthens a man's memory, and relieves it from the need of having

\* Fowler's Exchequer, i. 421, anno 1793.

recourse to that indulgence which has just been seen to be allowed in the court of chancery; or the indulgence of the court has been silently withdrawn in practice, while the continuators of Mr Harrison's book continue to represent as still in force the regulation by which it was granted.

#### SECTION VI.—*An infinite scale inapplicable, though the only true one.*

In respect of persuasion and probative force—persuasion, in the first place on the part of a witness, in the next place on the part of the judge,—probative force on the part of the evidence, of whatsoever nature it be, direct evidence or circumstantial evidence, evidence of persons or evidence of things;—an infinite scale (it has been already intimated) is the only sort of scale by which the truth of the case can be expressed. For what can that mass of evidence be, to the probative force of which no addition is made by the addition of a mass of evidence, exactly of the same composition in every respect, and twice as great?

Unfortunately, a scale to such a degree correct, would not, physically speaking, be capable of being applied to the particular purpose here in view.

The use, and only use, of the sort of scale in question, would be to enable the witness to give to his testimony, or the judge to his opinion, a less degree of effect in practice than what it is productive of without the employment of any such scale.

At present, the effect given to any such testi-

mony in practice is as great, never less than as great, as the utmost effect of which the highest possible degree of persuasion in that single breast could be productive. On the side of augmentation, then, nothing remains to be done. The persuasion is considered as being, in every instance, at the highest degree; or at any rate, in practice, the same effect is given to it as if it were.

At the same time, many are the instances in which it may be rendered manifest beyond a doubt, that the degree of persuasion, to which in practice all the effect is given that could be given to the highest, really falls greatly below the highest degree of which the force of persuasion is susceptible.

1. In the case of the *witness*, this deficiency can scarcely be rendered manifest by any considerations of a nature to operate alike on all minds to whom they are presented: where it exists, it is matter not of demonstration, but of sensation only; viz. on the part of the witness in question, by whom alone the force of the persuasion, of which the seat is in his own mind, can be perceived.

Even the witness, the individual himself whose persuasion is in question,—though his perception may have informed him, that, of two cases, his persuasion has been stronger in the second than in the first; still it is only by calling in the aid of numbers that it will be possible for him to declare, or so much as to settle with himself in his own mind, *how much*: of numbers, as, for instance, by saying,—in the first case it seems to me that the probability of the fact is as 2 to 1, in the second case as 4 to 1: inso-

much that, were it matter of necessity to me to lay a wager on the subject, such and no more are the odds that I would lay or take in the two respective cases.

2. In the case of the judge, on the other hand, the deficiency may be rendered manifest to third persons.

On the subject of a question of fact, deposed to by a number of witnesses; the fact having nothing of improbability in its nature, nor the witnesses anything to distinguish them in point of trustworthiness, nor their testimonies respectively anything to distinguish them in respect of the degree of persuasion manifested; the degree of persuasion on the part of the judge will of course be as the number of the witnesses.

This being the case; by every witness added on the same side, an additional degree of force will be added to the persuasion of the judge: and, if this be true with regard to a second and a third witness, it cannot be otherwise than true with regard to a hundredth or a thousandth.

Long before the number of witnesses has reached to the height of a hundred, the mind of the judge (it may be said) will have obtained all the satisfaction it could desire: long before this, the multitude will have appeared to him so abundantly sufficient, that he will have refused to give admission to any more.

This may, and naturally will be, the case. But should he even have refused admission to all the witnesses after the second, it will be impossible for him to deny, but that, after a thousand have been heard, an addition will still be made, by any other such witness, to the aggregate probative force of the whole mass of

evidence thus composed. Had he been the only witness, the testimony of this thousandth and first would of itself have been sufficient to determine the opinion of the judge. Such being the probative force of this testimony, if taken by itself; can there be any colour of reason for saying of it that it will be destroyed by the addition of a quantity of the same force, a thousand times as great?

If such be the case, while the witnesses are supposed to be all of them on the same side; still more manifestly will it be so, if, so many speaking in affirmation of the fact, so many others in negation of it, the number of them be supposed to be on each side the same. In this way let there be two thousand of them, the probative force of the two thousand and first will be no less perceptible and efficient than if it had been the only one.

Moreover, by this same example it seems manifested, that it is not possible that the probative force of testimony, nor, therefore, that the force of persuasion on the part of the judge, (to which may be added, on the part of any witness taken by himself,) should, on the side of augmentation, have any certain limit. It can never be so great, but that it would be capable of being rendered still greater.

In these circumstances; to allow to any person, either in the station of witness or in that of judge, the faculty of adding at pleasure to the declared force of his persuasion, would be to allow of an operation at the same time endless, useless, and ridiculous. Whatever latitude would in this respect be allowed to any one

such person, would be to be allowed to every other. But, the tendency of persuasion in one mind being to propagate like persuasion in other minds, and every such act of propagation being an exercise of power; the natural tendency of such an allowance would be a sort of auction, on the one part between witness and witness, on the other part between judge and judge; and in both cases an auction that would have no end. It being of the number of those cases in which insincerity and abuse would be altogether incapable of detection; it would also be of the number of those cases in which insincerity is universal, or little short of it.

But suppose again, (impossible as the supposition is,) that the highest possible degree of persuasion could, by means of such a scale, be reached and expressed; still in practice it would be useless: since no greater effect could be given to the maximum, the expression of which is the supposed result and fruit of the scale, than at present is given to the ordinary assertion, expressed in ordinary language, and without the use of any such scale. Of this simple assertion the effect is to act with the whole probative force of the testimony of the witness, with the whole force of the suffrage of the judge: and from the highest degree of persuasion,—were it possible, by the help of any such scale, to reach it and express it,—no greater effect could ensue.

From the allowance of a scale of the opposite description, limited on the side of increase, (limited in effect by its being raised up, as under the present practice, to its maximum, in every

case in which no scale is employed,) beneficial effects might be produced in some cases, no evil could be produced in any case.

Of the good effect, the nature has already been brought to view: the decision rendered conformable to justice, in cases in which, without the benefit of this instrument, it could not be conformable.

Abuse there could be none: insincerity there could be none: whether in the station of witness or in that of judge, a more irrefragable proof of sincerity could not be given, than by having recourse to such allowance.

By representing the force of his persuasion as lower than it is, what advantage could a man gain by the use of such a scale more than he could gain without it?

Yes, (it may be said) a man may in this way diminish the declared force of his persuasion, and thence the probative force of his testimony, contrary to truth, and yet without risk. Placing it on the wrong side, the falsehood of the declaration might be proved from other sources, and he punished for it, as in case of perjury: but, placing it on the right side, though at the wrong end, viz. at the very bottom, at 1, when it ought to have been at the very top, viz. at 10; he may thus, without risk, strike off nine-tenths of the force of his testimony; which defalcation, if there be many testimonies on both sides, may turn the scale.

Answer. True: in this case, he will save himself from punishment: but neither will he produce the mischief aimed at. Whatever force of counter-evidence would, in case of his placing his declared persuasion on the wrong side, have

been sufficient to convict him to the purpose of punishment; the same counter-evidence will, now that he has placed it at the wrong end of the scale, though on the right side, be, notwithstanding his endeavours, sufficient to prevent the abatement thus made in the degree of persuasion declared, from producing the corresponding diminution of probative force. He will not have it in his power to cut off a part of the force of his testimony from the side of truth, except in circumstances which would have allowed him with safety to throw it entire into the scale of falsehood.

#### NOTE BY THE EDITOR.

M. Dumont, in a note to the *Traité des Preuves Judiciaires*, has brought forward several objections against the scale which Mr. Bentham has suggested for the measurement of degrees of persuasion and probative force. It is fair that the reader should have the means of judging for himself, what degree of validity these objections possess. I quote from a recently published and very well executed translation of M. Dumont's work.

"I do not dispute the correctness of the author's principles; and I cannot deny that, where different witnesses have different degrees of belief, it would be extremely desirable to obtain a precise knowledge of these degrees, and to make it the basis of the judicial decision; but I cannot believe that this sort of perfection is attainable in practice. I even think, that it belongs only to intelligences superior to ourselves, or at least to the great mass of mankind. Looking into myself, and supposing that I am examined in a court of justice on various facts, if I cannot answer 'Yes' or 'No' with all the certainty which my mind can allow, if there be degrees and shades, I feel myself incapable of distinguishing between two and three, between four and five, and even between more distant degrees. I make the experiment at this very moment; I try to recollect who told me a certain fact; I hesitate, I collect all the circumstances, I think it was A rather than B: but should I place my belief at No. 4, or No. 7? I cannot tell.

"A witness who says, 'I am doubtful,' says nothing at all.—

in so far as the judge is concerned. It serves no purpose, I think, to enquire after the degrees of doubt. But these different states of belief, which, in my opinion, it is difficult to express in numbers, display themselves to the eyes of the judge by other signs. The readiness of the witness, the distinctness and certainty of his answers, the agreement of all the circumstances of his story with each other,—it is this which shows the confidence of the witness in himself. Hesitation, a painful searching for the details, successive connexions of his own testimony,—it is this which announces a witness who is not at the *maximum* of certainty. It belongs to the judge to appreciate these differences, rather than to the witness himself, who would be greatly embarrassed if he had to fix the numerical amount of his own belief.

“ Were this scale adopted, I should be apprehensive that the authority of the testimony would often be inversely as the wisdom of the witnesses. Reserved men—men who knew what doubt is—would, in many cases, place themselves at inferior degrees, rather than at the highest; while those of a positive and presumptuous disposition, above all, passionate men, would almost believe they were doing themselves an injury, if they did not take their station immediately at the highest point. The wisest thus leaning to a diminution, and the least wise to an augmentation, of their respective influence on the judge, the scale might produce an effect contrary to what the author expects from it.

“ The comparison with wagers and insurances does not seem to me to be applicable. Testimony turns on past events; wagers turn on future events: as a witness, I know, I believe, or I doubt; as a wagerer, I know nothing, but I conjecture, I calculate probabilities: my rashness can injure nobody but myself; and if a wagerer feels that he has gone too far, he often diminishes the chances of loss by betting on the other side.

“ It appears to me, that, in judicial matters, the true security depends on the degree in which the judges are acquainted with the nature of evidence, the appreciation of testimony, and the different degrees of proving power. These principles put a balance into their hands, in which witnesses can be weighed much more accurately than if they were allowed to assign their own value; and even if the scale of the degrees of belief were adopted, it would still be necessary to leave judges the power of appreciating the intelligence and morality of the witnesses, in order to estimate the confidence due

to the numerical point of belief at which they have placed their testimony.

"These are the difficulties which have presented themselves to me, in meditating on this new method."

On these observations of M. Dumont it may, in the first place, be remarked that, if applicable at all, they are applicable only to the use of the scale by the witness, not to the use of it by the judge, which latter use, however, is perhaps the more important of the two. In the next place, even as regards the witness, I doubt whether any great weight should be attached to the objections. For, first, what almost all of them seem to imply is, that, because we cannot in all cases attain the degree of exactness which is desirable, therefore we ought to neglect the means of attaining that degree of exactness which is in our power. The witness who does not know the degree of his persuasion,—the witness to whom the scale would be useless, will not call for it: the judge will at all events have the same means of appreciating *his* testimony, as he has now, and will not be the more likely to be deceived by a witness who does not use the scale, because it has happened to him to have received the testimony of one who does.

Secondly, the most formidable in appearance of all M. Dumont's objections—I mean that which is contained in his third paragraph—seems to me, if it prove anything, to prove much more than M. Dumont intended. The wise, says he, will place their degree of persuasion lower than they ought, the foolish, higher than they ought: the effect therefore of the scale is to give greater power to the foolish than they otherwise would have, and less power to the wise. But if this be true, what does it prove? that different degrees of persuasion should not be suffered to be indicated at all; that no one should be suffered to say he doubts. It is not the scale which does the mischief, if mischief there be. There are but two sorts of witnesses, the wise and the foolish: grant to them the privilege of expressing doubt, or any degree of persuasion short of the highest, and the foolish, says M. Dumont, will make no use of the privilege, the wise will make a bad use. But if so, would it not be better to withhold the privilege altogether? Is it the scale which makes all the difference?

The truth seems to me to be, that the scale will neither add to the power of the foolish witness, nor unduly diminish that of the wise one. It will not add to the power of the foolish witness, because he cannot place his persuasion higher

than the highest point in the scale; and this is no more than he could do without it. It will not unduly diminish the power of the wise witness; because the wise witness will know tolerably well what degree of persuasion he has grounds for, and will therefore know tolerably well whereabouts to place himself in the scale. That he would be likely to place himself too low, seems to me a mere assumption. The wiser a man becomes, the more certainly will he doubt, where evidence is insufficient, and scepticism justifiable; but as his wisdom increases, so also will his confidence increase, in all those cases in which there is sufficient evidence to warrant a positive conclusion.

## CHAPTER VII.

### OF THE FOUNDATION OR CAUSE OF BELIEF IN TESTIMONY.

#### SECTION I.—*That the cause of belief in testimony is experience.*

THAT there exists in man a propensity to believe in testimony, is matter of fact, matter of universal experience; and this, as well on every other occasion, and in any private station, as on a judicial occasion, and in the station of judge.

The existence of the propensity being thus out of dispute, then comes the question that belongs to the present purpose—is it right to give way to this propensity? and if right in general, are there no limitations, no exceptions to the cases in which this propensity must be admitted?

To the first question the answer is—Yes; it is right to give way to this propensity: the propriety of doing so is established by experience. By experience, the existence of the propensity is ascertained: by experience, the propriety of acting in compliance with it is established.

Established already by experience, by uni-

versal experience, it may be still further established by direct experiment, should any one be found willing to be at the charge of it. Continue your belief in testimony, as you have been used to believe in it, the business of your life will go on as it has been used to do: withhold your belief from testimony, and with the same regularity as that with which you have been in use to bestow it; you will not be long without smarting for your forbearance. The prosperity with which the business of your life is carried on, depends on the knowledge you have of the states of men and things, viz. of such men and such things as your situation in life gives you occasion to be acquainted with: and of that knowledge it is but a minute and altogether insufficient portion that you can obtain from your own experience, from your own perceptions alone; the rest of that of which you have need, must come to you, if it comes to you at all, from testimony.

And what is it that, by thus rendering it a man's *interest*, renders it *proper* for him to bestow a general belief on testimony? It is the general conformity of testimony to the real state of things—of the real state of things to testimony: of the facts reported upon, to the reports made concerning them.

And by what is it that this conformity is made known? Answer again—by experience. It is because testimony *is* conformable to the truth of things, that, if you were to go on treating it as if it was not conformable, you would not fail of suffering from it.

And by what is it that this conformity is produced? The question is not incapable of

receiving an answer, and therefore, being a practically important one, it is neither an improper nor an unreasonable one: a little further on an answer will be endeavoured to be given.

Forasmuch as, in man, whether on a judicial occasion, or on a non-judicial occasion, in a judicial station, or not in a judicial station, there exists a general propensity to believe in evidence; and forasmuch as in general the giving way to that propensity is right, being found to be attended with consequences advantageous upon the whole; so, when, on a judicial occasion, and in a judicial station, a man having received evidence has grounded his belief on it, pronounced a decision in conformity to such belief, and in the exercise of judicial power acted in conformity to such decision, there exists on the part of men at large, failing special and predominant reasons to the contrary, a propensity to regard such belief as rightly bestowed; and to yield to this propensity also is right, and in general productive of beneficial consequences, as is also established by experience.

Ask what is the ground—the foundation—or more simply and distinctly, the efficient cause of the persuasion, produced by evidence—produced by testimony? An answer that may be given without impropriety, is—*experience*: experience, and nothing but experience.

Experience?—of what? Of the conformity of the facts which form the subjects of the several assertions of which testimony consists, with the assertions so made concerning these respective facts.

In the course of the ordinary and constant intercourse between man and man in private life, propositions\* affirming or disaffirming the existence of this or that fact, are continually uttered in a vast variety of forms. For the most part, as occasions of obtaining perceptions, of and in relation to the facts in question, present themselves; the perceptions thus obtained are found conformable to the description given by those assertions. Testimony being thus for the most part found true in past instances, hence the propensity to expect to find it true in any given future instance: hence, in a word, the disposition to belief.

On the other hand, in some instances, instead of such conformity, disconformity is the result presented by the surer guide, perception; hence, the disposition to disbelief.

The number of the instances in which, to a degree sufficient for practice, this conformity is found to have place, is greatly superior to the number of the instances in which it is found to fail. Hence, the cases of belief constitute the general rule—the ordinary state of a man's mind; the cases of disbelief constitute so many cases of exception; and to produce disbelief requires some particular assignable consideration, operating in the character of a special cause.

The disposition or propensity to belief may, in this sense, be said to be stronger than the dis-

\* The word *testimony* is on this occasion avoided; the reason is, lest by that word the proposition should in any instance be considered as meant to be confined to the cases in which the assertion is supposed to be made on a judicial occasion.

position, the propensity, to disbelief. Were the proposition reversed, the business of society could not be carried on: society itself could not have had existence. For the facts which fall under the perception of any given individual are in number but as a drop of water in the bucket, compared with those concerning the existence of which it is impossible for him to obtain any persuasion otherwise than from the reports, the assertions, made by other men.

But why, it may be asked, does experience produce a propensity to believe in the truth of human assertions? Why does experience of the truth of testimony in time past, give rise to an expectation that it will be true in time to come?

Next, in point of utility, to the knowing of a thing, is the knowing that it is impossible to be known. By the former acquisition, power, in various useful shapes, is acquired; by the latter, pain, in the shape of useless labour and frequently-recurring disappointment, is saved. The instances in which the former acquisition is attainable, are impressed upon the eye of curiosity by every object on which it alights. The other, as unacceptable as it is useful, is turned aside from, in many instances, in which, upon a calm and attentive examination, it might be secured.

The relation of causality, the relation between cause and effect, is a soil in which the greatest understandings have toiled with great labour and no fruit: words, and nothing but words, having been the seed; words, and nothing but words, have been the produce.

Words being the names of things; and, for some time, to judge from the structure of lan-

guage, there having been no words but what were the names of real entities, of really existing things; as often as we take note of a distinct word, we are apt to assign to it, as an accompaniment of course, the existence of a distinct thing, a distinctly existing real entity, of which it is the accompaniment and the name; and this, whether there be any such distinctly existing entity or not.\*

Ask what is the foundation or cause of belief, of persuasion? I answer, without difficulty, *experience*. Ask what is the foundation, the cause, of the belief in the truth of human testimony,—of the persuasion entertained by one man of the truth of the statements contained in the testimony of another, in any given instance? I answer again, the experience of the truth of testimony in former instances. Discard the substantive word *cause*, and give me, instead of it, the import of it in disguise; disguised under the adverbial covering of the word *why*;† and ask

\* In the instances of the everlastingly occurring appellations *cause* and *power*, David Hume has pointed out the illusion flowing from this source: but, that he has pointed out the constitution of human language as the source from whence the illusion flows, is not, to my conception, alike clear.

† Of the single word,—the *adverb*, as it is called,—the verb *why*, the import, when developed, is found to be an entire proposition, and even a complex one. *My will is, that you name to me that thing which is the cause of that other thing.* So great was the error of the ingenious author of *Hermes*, when, in his analytical view of the grammatical forms called *parts of speech*, he attributed to the object represented by the adverb, the same simplicity as to the object represented by the noun substantive. Here, by the single adverb, we find represented, amongst others, the several objects respectively represented by no fewer than six nouns substantive.

me why I find myself disposed, in most cases, to believe in the truth of the statements made in my hearing by my fellow men: I answer, because, in the greater part of the instances in which such statements have been made, the truth of them has been made known to me by experience. In the experience I have had of the truth of the like statements in past instances, I view the cause of the propensity I find in myself to believe the truth of the statement in question in the present instance: to pronounce, in my own mind, the sort of judgment indicated by the words *I believe*.

Press me further, and ask me *why* it is that, on recollection of the truth of such statements in former instances, as certified to me by experience, I believe: ask me *why* it is that such experience produces belief; what is that ulterior and deeper or higher cause, that causes experience to be the cause of belief: you ask me for that which is not mine, nor anybody's, to give; you require of me what is impossible.

It may probably enough have appeared to you, that what you have been doing in putting to me that question, amounts to no more than the calling upon me for a proposition, to be delivered to you on my part. But the truth is, that, in calling upon me to that effect, you have yourself, though in an obscure and inexplicit way—you have yourself, whether you are aware of it or no, been delivering to me a proposition; and a proposition which, if my conception of the matter be correct, is not conformable to the truth of things. The proposition I mean is, that—over and above, and distinct from, those objects which you have in view, in speaking of

the words *experience* and *belief*, of which the first represents the effect, and the other the cause,—there exists a distinct object, in the character of an ulterior and higher cause, which is the cause of the causative power exercised by that first mentioned cause: such is the proposition which is comprehended and assumed, in and by your interrogative proposition beginning with the word *why*; but, to my judgment of the matter, this indirectly advanced proposition presents itself as erroneous. For, upon looking for such supposed distinct object, as the archetype of, and thing represented by, the word cause, as now, on the occasion of this second question, employed by you, it does not appear to me that any such object exists in nature. If ever it should happen to you to have discovered any such archetype, do me the favour to point it out to me, that I may look at it and examine it. Till you have done so, it will not be in my power to avoid considering as erroneous the proposition which you have been delivering to me in disguise.

What I have been able to see in the matter is as follows, viz:—

1. Certain facts, viz. of the physical kind (for such alone, to simplify the case, let us take)—the facts presented to me by experience.
2. Another fact, viz. of the psychological kind, the sort of internal feeling produced in my mind, and designated by the word *belief*. Both these are really existing objects: my feeling—my belief,—an object possessing at any rate whatever reality can be possessed by an object of the psychological kind,—and those physical objects, by which it seems to me that

it has been produced, or at any rate in consequence of which it has made its appearance on my mind. The aggregate of all those physical facts is what, on this occasion, I look upon as the *cause*: the feeling produced in my mind, the belief, is what I look upon as the *effect*.

What higher, what deeper, what intermediate, in a word, what other cause, would you have? What can it be? What should it be? If, which is possible, your request were to be complied with, what would you be the better for it? Would you be any the wiser for it, the richer, or even the more contented? Alas! no: no sooner had you got this higher cause than you would be returning again to the charge, and asking for one still higher; and so on again, without end. For, by the same reason (if there were one) by which you were justified in calling upon me for this first arbitrarily assumed and phantastically created cause, you will be justified in calling upon me, and, indeed, bound to call upon me, for another; and so another and another, without end.

By pressing me still further; between the set of physical objects, the aggregate of which is spoken of as constituting the *cause*, and the psychological object (*my belief*) spoken of under the name of the *effect*,—you may, if you insist upon it, oblige me to interpolate a number, almost any number, of intermediate causes. But, among these intermediate causes, be they multiplied *ad infinitum*, you will never find that recondite, that higher seated or deeper seated cause, which you are in quest of. From the material physical objects in question, came the

appearances, evanescent or permanent, issuing from those material objects: from those appearances, presenting themselves through the medium of sense to the minds of the several percipient witnesses in question, came the feelings of the nature of belief, in the minds of those several witnesses: in the minds again of those witnesses, by the agency of this or that motive, were produced the exertions by which the discourses assertive of the existence of those several objects were conveyed to me: by those assertions, thus conveyed to my mind, was produced, on each occasion, in the interior of my mind, a correspondent feeling of *belief*: by the recollection, more or less distinct and particular, or rather by an extremely rapid and consequently indistinct and general recollection of the aggregate of those feelings, or rather of an extremely minute part of them (for in one extremely minute part is contained all that is possible, and yet quite as much as is sufficient) was produced the belief which my mind entertains at present, affirmative of the existence of the facts contained in the particular statement delivered to me by the particular individual whose testimony is now in question.

Such is the chain, the links of which may be multiplied almost to infinity: between every two links you may call upon me, if you please, for the cause by which the latter of them is connected with the former. But, in each instance, the answer, for the reason already given, must be still the same—there is no such latent, recondite cause. In your imagination, the picture of it,—yes, if you say there is: in external nature, the original of it, no where.

SECTION II.—*Objections against the principle, that the cause of belief in testimony is experience, answered.*

It is with rules of morality and propositions in psychology, as with laws: when the indication of reasons, and these reasons grounded on experience, is regarded as unnecessary, any one man is as competent to the task of making them as any other; and, to the number and variety of them, all with equal pretension to the character of goodness, there is no end. To make good laws requires nothing but power; to make good rules of morality, or good propositions in psychology, requires nothing but a combination of arrogance with weakness.

Thus it is that as America, British-born America, swarms with books full of laws; Scotland swarms with books full of rules of morality, and propositions of psychology, mixed up together and undistinguished, the propositions from the rules.

In morals, as in legislation, the *principle of utility* is that which holds up to view as the only sources and tests of right and wrong, human suffering and enjoyment—pain and pleasure. It is by experience, and by that alone, that the tendency of human conduct, in all its modifications, to give birth to pain and pleasure, is brought to view: it is by reference to experience, and to that standard alone, that the tendency of any such modifications to produce more pleasure than pain, and consequently to be *right*, or more pain than pleasure, and consequently to be *wrong*, is made known and demonstrated. In this view of the

matter, morality, as well as policy, is always matter of account. On each occasion, the task to be performed consists in collecting together the several items on both sides, and, in the instance of each item an estimate being formed of its value, regard being paid to the several elements of value,\* to determine on which side, on that of pleasure or pain, of profit or loss, the difference is to be found; in a word, to strike the balance.

But to make up an account of this sort requires thought and talent: to apply the principle of common sense, or moral sense, or any other purely verbal principle, requires nothing but pen, ink, and paper. Hence it is that, as, from the application made of these verbal principles, these pretences for governing and directing without reason, there can never be any fruit, so neither to the number of them need there ever be any end.

What the logic of the Aristotelian school was to physical science, that science to which for near 2000 years it officiated as a substitute; such are the sciences of morals and legislation, as taught by the application of these verbal principles, to the same sciences as taught by applications made of the principle of utility; by reference, unceasing reference, to experience—experience of pain and pleasure.

In the school for Latin and Greek at Westminster, instruction in the art of making nonsense verses under that name, precedes the art of making such verses as pretend to sense. The

\* See Dumont's "Traités de Legislation," and Bentham's "Introduction to the Principles of Morals and Legislation."

Aristotelian logic, had it stiled itself with equal candour, in its character of a substitute to experimental physics, might have stiled itself *nonsense physics*: and, in like manner, and with equal justice, the ethics which consist in the application of the principle of moral sense, that is, in the repetition of the words moral sense, *nonsense ethics*: and the psychology, which points to an innate propensity as the efficient cause of persuasion, independently of, and in opposition to, experience of human correctness and incorrectness—*nonsense psychology*.

A curious spectacle enough would be, but rather more curious than instructive, to see a partisan of moral sense in dispute with a partisan of common sense, or two partisans of either of these verbal principles in dispute with one another. Let the common sense of one of them command what the moral sense of another leaves indifferent or forbids; or let the common sense of one of them forbid what the moral sense of another leaves indifferent or commands; or let the like conflict have place between two philosophers of the common sense, or two partisans of the moral sense. When each of them has delivered the response of his oracle according to the interpretation put upon it by itself, all argument should, if consistency were regarded, be at an end: as, at a Lincoln's Inn exercise, where one of the pleaders has declared himself for the widow, and the other against her, the debate finishes.

In such a case, when a disagreement happens to take place (for when men talk thus at random, it can but happen to them to disagree), if to either of them it appears in his power,

and worth his while, to gain the advantage, he betakes himself for support to the only principle from which any support is to be had—to the principle of utility. But, as often as he betakes himself for support to a quarter so widely distant, so often does he desert, and, by implication, by necessary implication, acknowledge the inanity of, his own principle. For if, by pronouncing the words moral sense, a man can learn what is right, what indifferent, and what wrong, in any one case, why not in every other? And if the tendency of an action to produce most pleasure or most pain be the criterion and measure of its claim to be pronounced right, indifferent, or wrong, in any one case; in what other can it fail of being so?

But the course which hitherto men have followed, in undertaking to philosophize, to learn and to teach the science of legislation, ethics, or psychology, is this:—In the first place, under the joint direction of custom, that is, of prejudice; of interest, under whatever shape; and of unreflecting and unscrutinizing caprice; a man makes out his list of favourite tenets. These tenets he determines to adhere to and advocate at all events: and, this determination formed, all that remains for him to devise is the form of words, which, under the name of a principle, presents itself as best adapted to such his purpose.

The conclusion is,—there are two distinguishable branches of philosophy, which, as they have been taught upon the *ipse dixit* principle, confer on the science a claim above dispute to the title of the philosophy of nonsense.

1. Nonsense ethics. This is the science

taught by him, by whom an alleged propensity, on his own part or on the part of any other person or persons in any number, to approve of any sort of act, is represented as imposing on persons in general an obligation, or bestowing on them a warrant, to approve of it, and to exercise it; and, *vice versa*, a propensity to disapprove of it, as imposing on persons in general an obligation to abstain from it, or conferring on them a licence to forbear exercising it; and this, without regard to the effects of it upon the aggregate welfare of the community in question, in the shape of pain and pleasure.

2. *Nonsense pisteutics.*\* This is the sort of science taught by him, by whom an alleged propensity, on his own part or on the part of any other person or persons, to give credit to testimony (or say *assertion* or *report*) concerning any supposed fact or class of facts, is represented as imposing on the will of persons in general an obligation, or affording to their understanding a sufficient reason, to entertain a persuasion of the existence of such fact or class of facts; and this, without regard to the probability or improbability of such fact or facts, as indicated by experience.

To an act of judgment, having for its subject the existence of a supposed matter of fact asserted in the way of testimony, substitute a judgment on any other subject without distinction; and nonsense *pisteutics*, receiving a proportional increase in the field of its dominion, becomes nonsense *dogmatics*.

\* From *νιστεω*, to believe. The reader will excuse this convenient barbarism.

So long and so far as science is taught upon this principle—if, where there is nothing to be learnt, the word *teaching* can be regarded as applicable,—the greater the number of books of which it becomes the subject, so much the further are the readers, (supposing the number of the readers, and their expence in the article of attention, to increase with the number of the books), from making any advances in true knowledge.\*

When, by a consideration of any kind, a man is determined to maintain a proposition of any kind, and finds it not tenable on the ground of reason and experience; to conceal his distress, he has recourse to some phrase, in and by which the truth of the proposition is, somehow or other, assumed.

Thus, in the moral department of science; having a set of obligations which they were determined to impose upon mankind, or such part of it at any rate as they should succeed in engaging by any means to submit to the yoke;

\* The propensity on the part of writers to attach to the idea of *practice* the idea of obligation, and that not declaredly in the way of inference, but silently and without notice in the way of substitution; this propensity, and the confusion spread by it, not only over the whole field of moral science, but over the adjacent territories to a great extent, was noticed, and, perhaps, for the first time, by Hume, in his *Treatise on Human Nature*. But, such is the force of habit and prepossession; after pointing out the cause of error, he continued himself to be led astray by it. On some occasions the principle of utility was recognized by him as the criterion of right and wrong, and in this sense the efficient cause of obligation. But on other occasions the *ipse dixit* principle, under the name of the moral sense, was, with the most inconsistent oscillancy, seated by his own hands on the same throne.

phrases, in no small variety and abundance, have been invented by various persons, for the purpose of giving force to their respective wills, and thus performing for their accommodation the functions of a law. Law of nations, moral sense, common sense, understanding, rule of right, fitness of things, law of reason, right reason, natural justice, natural equity, good order, truth, will of God, repugnancy to nature.\*

\* An appropriate name for this class of phrases would be *covers for dogmatism*; an appellation indicating the property common to them all, of serving as cloaks for ipse-dixitism, for that fallacy which has been termed by the logicians *petitio principii*.

To say that an act is right or wrong, because it is conformable or disconformable to the law of nature, is merely to say that it is right or wrong because it is conformable or disconformable to right or wrong. What law has nature? What is nature itself? Is it a poetical and imaginary personage, which I suppose nobody ever seriously believed to have any real existence? Is it the physical and psychological world, considered as a whole? Take the word in either sense, "law of nature" is a phrase which can have no meaning; and he who uses it means nothing by it, except his own opinions, or his own feelings; which he thus endeavours to erect into a standard, to which the opinions and feelings of others are to conform.

To say, in like manner, that an act is right or wrong because it is conformable or disconformable to conscience, or moral sense, is to say that it is right or wrong, because I, the speaker, approve or disapprove of it. For what is conscience, or moral sense, except my own feeling of approbation or disapprobation? By what other test am I to determine what is conformable to conscience, what is conformable to the moral sense?

The moralists, or pretended moralists, who make use of these words, may be said to belong to the *dogmatical school* of ethics: since they give their own approbation or disapprobation, as a reason for itself, and a standard for the approbation or disapprobation of every one else. This appellation will distinguish them from those who think that morality is

A similar exhibition of scarcely disguised *ipse-dixitism* has been made in the field of *piesthetics*, as in that of ethics.

Improbability—the improbability of the fact in question, as related by the witness, is a species of counter-evidence, operating against his testimony: a species of counter-evidence of the nature of *circumstantial* evidence: and so, whatsoever be the number of the witnesses.

Of the two opposite results, which is the most probable? That the fact in question, improbable as it appears, should notwithstanding be true? or that the testimony of the witness in question should, by some circumstance or other, have been rendered incorrect in respect of the report made concerning it?

No: it has been said. There are certain cases in which the improbability of a fact,—improbability, though in ever so high a degree,—ought not to be considered as acting with a disprobatative force great enough to outweigh the probative force of a mass of direct testimony, affirming the existence of it. Why?—Because the allegation, by which a fact is said to be improbable, can have no other basis than human experience: but the probative force of direct testimony, let the fact asserted by it be what it may, rests upon a foundation anterior to, and more solid than, that of experience: viz. an innate propensity in human nature; a propensity on the part of a man to give credit to what he hears affirmed by others; a propensity which, commencing at the very moment of his birth, not the province of dogmatism, but of reason, and that propositions in ethics need proof, as much as propositions in mathematics.—*Editor.*

renders itself manifest in the very earliest infancy, as soon as any propensity has time to manifest itself; at a period antecedent, if not to all experience, at any rate to all experience of conformity between facts reported and the testimony by which they are reported.

The debility of this argument is sufficient of itself to betray the occasion on which, and the cause in support of which, it was invented. The occasion was of the number of those in which, belief, or the *assertion of belief*, being pre-determined by considerations operating not on the understanding but on the will—by good and evil, by reward and punishment, by hope and fear; what remained was to find arguments to justify it: arguments which, the more obscure and irrelevant they were, would be but the more difficult to be refuted. Whether the cause had really any need of such arguments, is an enquiry that belongs not to the present purpose.

Innate ideas, the principle so fully exploded by Locke, constituted the medium of proof employed in his time, for the proof of whatsoever proposition was determined to be proved, and could not, as supposed, be proved by any other means.

To innate *ideas*, the doctrine here in question substitutes, if it be not rather an exemplification than a substitution, an innate *propensity*.

But, admitting the propensity, what is the use thus made of it? To prove the truth of the following proposition,—viz. that whatever is said, probable or improbable, is, by being said, if not rendered, at least proved, to be true?

All the extravagances, all the false concep-

tions, that ever have been entertained, may by this argument be proved to be true: for there is not any of them but is the result of this propensity to believe what is said by others; this propensity, so strangely supposed to be antecedent to experience—as if anything subsequent to the moment of birth could be antecedent to experience.

Two propositions are here implied: two propositions, of each of which the absurdity strikes the mind upon the first mention:—1. that a disposition to believe testimony has an efficient cause other than experience:—2. that if it had, it would afford an adequate reason for believing in opposition to experience.

But it is in children (it is said) that the reliance on testimony is strongest: strongest in man at that time of life when he has had least experience. Such is the argument, on the strength of which it is concluded that man's reliance on man's testimony has not experience for its ground—experience of the conformity of that testimony to the truth of things; but is produced by an independent innate principle, made on purpose, and acting before experience. Before any experience has taken place, this confidence is at its maximum: as man advances in life, it grows weaker and weaker, and the cause that renders it so, is experience.

A child's reliance on testimony, on the truth of human assertion, antecedent to experience! As if assertions, and experience of the truth of them, were not coeval in his perceptions with the very first instances of the use of language!

Banish the phantom, the offspring of dis-

tressed imposture, the innate principle—consult experience, man's faithful and steady guide—and behold on how simple a ground the case stands. In children, at an early age, the reliance on assertion is strongest: why?—Because at that age experience is all, or almost all, on one side. As age advances, that reliance grows weaker and weaker: why?—Because experience is acquired on both sides; experience certifying the existence of falsehood as well as that of truth. The proportion of falsehood to truth commonly itself augments: and, though it should not itself augment,—that which can not fail to augment, and of which the augmentation answers the same purpose, is the habit, the occasion, and the facility of observing it.

But if a ferry-boat (says an argument in the same strain) if a ferry-boat, that had crossed the river 2000 times without sinking, should, by a single supposed eye-witness, whose character was altogether unknown, be reported to have sunk the two thousand and first time—here is a highly improbable event, improbable in the ratio of 2000 to 1, believed upon the testimony of this unknown and single witness; believed, and, who will say, not rightly and rationally believed?

An improbability of 2000 to 1? No, nor of 1 to 1. Yes, perhaps,—if a ferry-boat, being a thing unlike every thing else in nature—or a ferry boat, and every thing else partaking in respect of submergibility of the nature of a ferry boat—had been known to cross water 2000 times, and never known once to sink. But the aptitude of things in abundance, the ap-

titude of the materials of which ferry-boats are composed, to sink in water, when pressed by other bodies lying in them, is a fact, composed of an immense mass of facts made known by an immense body of experience. Boats of almost all kinds, it is sufficiently known by experience, are but too apt to sink: which thing being considered—of all those who have seen or heard of a ferry-boat, is there a single person to whom, though the same boat should be known to have crossed the water in question 10,000 times instead of 2000, the report of its having sunk should present itself as in any degree improbable?

Yes, if a boat, composed solely of cork, and that of the same shape with the ferry-boat in question, except as to the being solid instead of being hollow; if a boat of such description were reported to have sunk, and without anything drawing it down, or pressing upon it; here, indeed, would be an improbability, and such an improbability, as, to the mind of a man conversant with the phenomena and principles of hydrostatics, would not be rendered probable or credible by the report of a thousand witnesses; though they were all of them self-pretended eye-witnesses.

Experience is the foundation of all our knowledge, and of all our reasoning: the sole guide of our conduct, the sole basis of our security.

Of the argument now under consideration, the object is to persuade us to reject the counsel of experience: to credit, on no better ground than because this or that person or persons have asserted it, a fact, the superior incredibility of which is attested by experience.

This is, in other words, to throw off the character of rational beings, and in cold blood to resolve to act the part of madmen.

It is by experience we are taught, that, in by far the greater number of instances individually taken, the testimony of mankind, the assertions made by human creatures, are either true, or, if in any respect false, clear of all imputation as well of temerity as of wilfulness. It is by the same experience we are taught, that, in a part of the whole number of instances, these assertions are not only false, but tainted with one or other of those two vices: and that, even so far as concerns wilful falsehood, or, in one word, mendacity—though, comparatively speaking, relation being had to the aggregate mass of human assertions, the instances of mendacity are numerically small,—yet so vast is that aggregate, that, absolutely taken, the same number in itself is immense.

It is by experience we are taught, that, as in the case of every other modification of human conduct, so in the case of assertion (and all discourse, interrogation not excepted, is in one shape or other *assertion*), no action is ever performed without a motive: no act of mendacity is therefore without a motive. But a proposition that will be made good as we advance, is, that, as there is no modification of interest, no species of motive, by which mendacity is not capable of being produced, so there is no occasion on which there can be any certain ground of assurance that the assertion uttered is not mendacious: no human being, in whose instance there can be any certain ground of as-

surance that his assertion is altogether untainted by that vice.

The proposition—*all men speak always true*, is therefore a proposition which itself is not true but with an innumerable and continually accumulating multitude of exceptions. But, in regard to facts of the physical class, there are facts in abundance, which are true without a single exception. Take for instance, that iron is heavier than water. Accordingly, it is not by the testimony of a thousand witnesses that to a well informed mind it could be rendered in a preponderant degree probable, that in any one single instance a mass of iron had been found less heavy than an equal bulk of water. Supposing a fact of this kind thus asserted, and supposing, what could never be proved, that, in the instance of any number of the witnesses, the assertion was altogether pure of mendacity; the conclusion would be, either that that which was taken for iron was not iron, but some other substance, wood for example, with the appearance of iron superinduced upon it; or that that which was taken for water was not water, but some other liquid, mercury for example, with a coat of water lying upon it; or that that which was taken for a solid mass of iron, *i. e.* for iron only, was a hollow mass of iron, *i. e.* a mass of air, or a void space, inclosed in a cover of that metal.

“The improbability of a fact affords no reason, no sufficient reason, for refusing to believe it, if attested by witnesses; by witnesses whose character is not exposed to any special cause of suspicion.” Such is the notion which has been

endeavoured to be inculcated. But, to accede to any such doctrine, to suppose that there can be any imaginable case in which it can be just, is to give up, and to call upon all others to give up, the use of human reason altogether, on every question of evidence: which is as much as to say, on every question of fact.

In the same strain, the only language with which it is possible to reason upon the subject, shall be protested against, and denounced as figurative, improper, and unsuited to the subject: in the same strain, and with perfect consistency. The end in view is, by dint of *ipse dixit* with obscure terrors at the back of it, to engage men to believe, with the utmost force of persuasion, certain supposed facts, which some men have asserted or have been supposed to assert, in whatsoever degree improbable. But, to this design all consideration of improbability being hostile; all language in which improbability and its degrees are brought to view, and made the subject of description, will of course be equally so.

When reason is against a man, a man will be against reason. In this he is consistent: as consistent as he is the contrary, when reason, or something that calls itself reason, is employed in proving, that, on such or such a subject, reason is a blind guide, and that to be directed by her is unreasonable.

When a man is seen thus occupied, sapping the foundations of human reason, and with them the foundations of human society, and of human security, in all its shapes, how shall we account for such preposterous industry? Before him lay a parcel of facts which, be they what

they may to other eyes, to his, at any rate, seemed improbable. Improbable as they were, a determination had been taken that they were to be believed at any rate. Readers were to be persuaded to believe them, and to consider him as believing them likewise; and thus the argument was to be constructed. "There is an innate propensity in every human being to believe whatever is said by any other: to believe probable things; to believe, moreover, improbable things. That the propensity is innate, is evident; for it manifests itself in each human being, at a period antecedent to the commencement of his experience: of his experience (to wit) of the agreement of facts with the reports made by men concerning them. It manifests itself with peculiar strength in children: with the greater degree of strength, the younger they are: with the greatest degree of strength, in those who have least experience. But, forasmuch as this propensity exists on all occasions, therefore man ought to yield to it on all occasions."

Good ; when the propensity exists : admitting always, that, whatsoever propensity exists in a man, it is good for him to yield to. But, in the instance of a man in whom it does not exist, what argument does it afford ? Is one man obliged to believe, or is it reasonable for him to believe, a thing, and that an improbable thing, only because another man has a propensity to believe it ? Are men obliged to believe—is it reasonable for them to believe—improbable things, because children do ?

Being then good, as a reason for believing, apply this innate propensity to action. Cor-

respondent to the believing of improbable things, is the doing of foolish ones: what the one is in theory, the other is in practice. Foolish belief, if there be any such thing, what is it? It is neither more nor less than the belief of improbable things. A has a propensity to do foolish things; therefore it is incumbent on, and reasonable for, B, to do foolish things: children are apt to do foolish things; therefore, so ought men.

#### NOTE BY THE AUTHOR.

Dr. Price, to whose honest, but rather unfortunately successful, mathematical labours, England is indebted for the sinking-fund system, gives us, in one of his essays, a mathematical demonstration of the probability of improbabilities. Imagine a lottery, says he, with a million of blanks to a prize: take No. 1, No. 1,000,001, or any intermediate number; and suppose yourself to hear of its gaining the prize: would you find any difficulty in believing it? No, surely: yet here is an improbability of a million to one: and yet you believe it without difficulty. If this ratio does not import sufficient improbability, instead of millions take billions: or, instead of billions, trillions, and so on.

Well then, since we must stop somewhere, we will stop at a trillion. This being the nominal ratio, what is the consequence? Answer—That the real ratio is that of 1 to 1. One little circumstance of the case had escaped the observation of the mathematical divine. Of the trillion and one, that some one ticket should gain the prize, is matter of necessity: and of them all, every one has exactly as good a chance as every other. Mathematicians, it has been observed, (so fond are they of making display of the hard-earned skill acquired by them, in the management of their instrument) are apt not to be so scrupulous as might be wished in the examination of the correctness and completeness of the data which they assume, and on which they operate.

A book on ship-building will be filled with letters from the close, and letters from the beginning and middle, of the alphabet; and a ship built upon the plan proved by it to

give the maximum of velocity, shall not sail perhaps so quick as one built by a carpenter, whose mathematics had terminated at the rule of three. Why?—because, of the dozen or half dozen influencing circumstances on the conjunct operation of which the rate of sailing depends, some one had unfortunately escaped the attention of the man of science.

Halley, whose deficiency in Christian faith was not much less notorious than his proficiency in astronomy and mathematics, thought he had given a death-blow to revealed religion, when he had published in the Philosophical Transactions a paper with  $x$ 's and  $y$ 's, shewing the time at which the probative force of all testimony would be reduced to an evanescent quantity. Yes, if testimony had no other shape to exhibit itself in than the oral. But, not to speak of the Shasters and the Koran,—the Bible, against which the attack was levelled, comes to us in the written form: and whatever may be the difference in point of extent, as measured by numbers, between the judgment that will be passed on it ten thousand years hence, and the judgment passed on it at present, it will not be easy to say on what account its title to credence should by that length of time, or any greater length of time, be considered as diminished.

#### FARTHER NOTE BY THE EDITOR.

When Dr. Price affirms that we continually believe, on the slightest possible evidence, things in the highest degree improbable, he confounds two ideas, which are totally distinct from one another, and would be seen to be such, did they not unfortunately happen to be called by the same name: these are, improbability in the ordinary sense, and mathematical improbability. In the latter of these senses there is scarcely any event which is not improbable: in the former, the only improbable events are extraordinary ones.

In the language of common life, an improbable event means an event which is disconformable to the ordinary course of nature.\* This kind of improbability constitutes a valid reason for disbelief; because, universal experience having established that the course of nature is uniform,

\* See Book V. CIRCUMSTANTIAL. Chap. 16. Improbability and Impossibility.

the more widely an alleged event differs from the ordinary course of nature, the smaller is the probability of its being true.

In the language of mathematics, the word improbability has a totally different meaning. In the mathematical sense of the word, every event is improbable, of the happening of which it might have been said *a priori* that the odds were against it. In this sense, almost all events which ever happen are improbable: not only those events which are disconformable, but even those events which are in the highest degree conformable, to the course, and even to the most ordinary course, of nature. "A corn merchant goes into a granary, and takes up a handful of grain as a sample; there are millions of grains in the granary, which had an equal chance of being taken up. According to Dr. Price, events which happen daily, and in every corner, are extraordinary, and highly improbable. The chances were infinitely great against my placing my foot, when I rise from my chair, on the precise spot where I have placed it; going on, in this manner, from one example to another, nothing can happen that is not infinitely improbable."

*Traité des Preuves Judiciaires*—translation, p. 282.

True it is, in all these cases (as well as in that of the lottery, supposed by Dr. Price) there is what would be called, in the language of the doctrine of chances, an improbability, in the ratio of as many as you please to one: yet it would obviously be absurd to make this a reason for refusing our belief to the alleged event; and why? Because, though it is in one sense an improbable event, it is not an extraordinary event; there is not in the case so much as a shadow of disconformity even to the most ordinary course of nature. Mathematically improbable events happen every moment: experience affords us no reason for refusing our belief to *them*. Extraordinary events happen rarely: and as respects them, consequently, experience does afford a valid reason for doubt, or for disbelief. The only question in any such case is, which of two things would be most disconformable to the ordinary course of nature; that the event in question should have happened; or that the witnesses by whom its occurrence is affirmed, should have been deceivers or deceived.

## CHAPTER VIII.

### MODES OF INCORRECTNESS IN TESTIMONY.

An analytic sketch of the different shapes in which falsehood is wont to shew itself, will not be altogether without its use : its particular uses in practice will be pointed out presently.

The modifications of falsehood may be deduced, either from the consideration of the part taken by the *will* in relation to it, or from the consideration of the *facts* which are the subject matter of the picture thus deviating from the line of truth. Those which result from the former topic will be brought to view in the next chapter. There remain those which respect the nature of the fact in question, or the form of the assertion of which it is the subject.

Cause, homicide. Titius is under examination. Question :—What do you know about this business? Answer :—1. Reus struck Defunctus :—2. Reus did not strike Defunctus.—3. I know not whether Reus struck Defunctus or no. Any one of these answers, it is evident, is as susceptible of falsehood as another. In the two first cases, the falsehood consists in false assertion—affirmative in one case, negative in the other ; in the third case, it consists in allegation of ignorance.

1. Falsehood, in the way of positive or affirmative assertion:—2. Falsehood, in the way of negative assertion:—3. Falsehood, by alleged ignorance.

Falsehood by allegation of ignorance, it is evident, is altogether as susceptible of mendacity, as falsehood in the way of assertion; and whenever mendacity is an object meet for punishment, it is as much so in this shape as in the other. Unfortunately, it is not so open to disproof as the other. Why? Because in this case, the fact, which is the subject of the false testimony, has nothing physical in it,—is purely of the psychological kind. Were it exempt from punishment, there would be no witnesses but those who are called *willing* ones. The condition of a delinquent, whatever were the crime, would be subject altogether to the good pleasure of the individuals whose testimony was requisite to ground a decision on that side: to afford him impunity, to grant him a virtual pardon and protection, nothing more would be needful on their part than to say, I know nothing, or I remember nothing, about the matter.

To protect a witness (his testimony being necessary to conviction) to protect him against cross-examination, when uttering a falsehood of this sort, is to hold out impunity to the whole catalogue of crimes. On a memorable and never-to-be-forgotten occasion, English judges, all with one voice and hand, scrupled not to aim this mortal stab at penal justice.\* Impunity to a crime of the deepest die, a plot for the assassination of the sovereign, has been

\* Trial of Warren Hastings.

among the fruits of it in practice.\* Since that time, judges have slunk in silence from the precedent.† But the decision remaining unreversed, and, but for legislative authority, un-reversible, the consequence of the departure is not the restoration of justice, but, on each future occasion, justice or impunity at the option of the judge.

**Question.**—About what thickness was the stick with which you saw Reus strike his wife *Defuncta*? **Answer.**—About the thickness of a man's little finger. In truth it was about the thickness of a man's wrist. Falsehood in this shape may be termed falsehood in *quantity*.

**Question.**—With what food did the jailor Reus feed the prisoner *Defunctus*? **Answer.**—With sea-biscuit, in an ordinarily eatable state. In truth, the biscuit was rotten and mouldy in great part. Falsehood in this shape may be termed falsehood in *quality*.

Under what tree was the act committed? said Daniel to each of the Elders, separately. Under a Mastic tree, said the one: under a Holme tree, said the other. In truth, not being committed at all, it was not committed under any tree. Falsehood in this shape may be termed falsehood in *circumstance*.

The distinction between fact and circumstance, it should here be noted, is extremely apt to be obscure and indeterminate. It supposes the individualization of each fact, the boundary line which divides that from all other facts, to be clear and determinate: whereas, nothing is more

\* Trial of Crossfield.

† Trial of Codling.

apt to be indeterminate. It supposes the distinction between fact and circumstance to be clear and uniform: but nothing is more variable. The term circumstance is but relative: a circumstance is itself a fact, any one of a number of facts considered as *standing round* the principal fact.

The falsehood that respectively accompanied the above-mentioned assertions, Reus struck Defunctus—Reus did not strike Defunctus—presents itself in a shape different from any of the above three; it went to the act, and did not confine itself to quantity, quality, or circumstance. It may be termed falsehood *in toto*.\*

Falsehood in quantity and in quality, is that sort of falsehood which is most apt, and, indeed, almost exclusively apt, to be produced by bias. Whether produced by bias or by mendacity, it is in general peculiarly difficult to disprove: it is accordingly in this quarter, so far as concerns physical facts, that mendacity finds its surest refuge.

It is, however, liable enough to be disproved where the fact in question is of a nature to afford *real* evidence, and that of the permanent kind: if, for example, the stick, or the unwholesome food, having been impounded and preserved, come to be produced in court. But if the thing, the condition of which was the subject of the falsehood, be not forthcoming; whether from its nature (for example, wind or running water), or by accident; this means of detection

\* But as circumstance is a name that may be given to a fact of any sort, falsehood in circumstance and falsehood *in toto* may in this respect coincide.

fails. The size of the stick is not out of the reach of subsequent measurement: the force with which the blow was given, is: except in so far as it may be guessed at from the appearance of the wound or bruise.

The practical use of these distinctions is this. In the case where the falsehood is only in quantity or quality, the aberration of the evidence from the truth may be accompanied or not with that consciousness which gives it the denomination of *wilful* in ordinary language: in the case where the evidence is false *in toto*, the falsehood cannot but have been accompanied with that culpable consciousness; it cannot have been otherwise than *wilful*: unless it have arisen from that sort of disorder in the imagination, which may be set down to the account of insanity while it lasts.

Of evidence false *in toto*, the sort of evidence so unhappily frequent in penal causes, and so familiar accordingly in legal language, under the name of *alibi* evidence, may serve as an example. The defendant is accused of having killed a man with a hedge-stake, at a certain place and time: a witness is produced, who says, I am well acquainted with him, he was conversing with me at another place, considerably distant (naming it), in a small room, exactly at that time. The evidence may be true or false; but what is certain is, that, if it be false, the falsehood cannot be otherwise than *wilful*, barring the possibility that one man may have been taken for another. A man cannot be at two distant places at the same time: and, with the exception just stated, a man cannot, in the compass of a small room, really conceive

himself to have been seeing and holding converse with another man, who, in fact, was never there.

What was the size of the stake, the degree of force with which the blow was given: did the deceased, on his part, aim a blow at the defendant, or merely endeavour to ward off the defendant's blow: all these are so many circumstances, in respect of which the mendacious consciousness may or may not be present, although the testimony were more or less unconformable to the exact truth of the case—in a word, were *false*.

Falsehood *in toto*, and falsehood *in circumstance*, will be found, accordingly, to differ, in a number of points of very essential importance in practice.

1. Falsehood *in toto* is, in a decidedly pre-eminent degree, exposed to detection and disproof: in the case of falsehood in circumstance, in quantity, or quality, the facility, and even possibility, of detection, will depend upon the degree of aberration from the truth.

2. In the case of falsehood *in toto*, the aberration, as already observed, cannot but be accompanied with mendacious consciousness: falsehood in quantity, quality, or other circumstance, may be produced by *bias*, by the influence of motives on the affections, without being accompanied by any such consciousness.\*

3. Falsehood *in toto* is accordingly that species of falsehood of which a man is in general con-

\* For the explanation of *mendacity* and *bias*, see the next chapter. The meaning of the terms is in general sufficiently well understood to render an anticipated explanation of them in this place unnecessary.

victed, when he is convicted of perjury. Perjury, in respect of quantity, quality, or other circumstance, may have been committed a hundred times without the possibility of a single conviction upon sufficient grounds.

Question to Reus.—What was your intention in striking Defunctus? Answer.—To disable him, so as to put it out of his power to hurt me. In truth it was to deprive him of life. Question.—By what motive were you instigated to strike Defunctus? Answer.—By self-preservation: the desire to save my life. In truth, it was enmity: his own life was in no danger. In both these cases, the subject matter of the falsehood, it is manifest, was a psychological fact: in the preceding cases, it was a physical fact.

Psychological facts, it is evident, present a more inviting field to mendacity than is commonly presented by physical facts. But this does not hinder the application of punishment, as for mendacity, to falsehood in the one shape, any more than in the other. If it did; in this case, as in the preceding one, impunity would be secured to many a crime. Not but that, as already observed, psychological facts are much more satisfactorily proved by circumstantial than by direct evidence. In the way of direct evidence, a fact of this class cannot be proved by any person but the one person whose mental faculties are the seat of it.

The field of motives is an open and ample field for the exercise not of mendacity only, but of bias. The tendency of bias is to attribute the greatest share, or rather the whole agency, in the production of the act, to a par-

ticular motive; to the exclusion of, or in preference to, whatever others may have concurred in the production of it. Few indeed that are able, scarce any that are willing, to give, on every occasion, a correct account of the state of the psychological force by which their conduct has been produced.

Ask Reus for his own motives; they are the most laudable, or, in default of laudable, the most justifiable, or at least excusable, of any that can be found. Ask a friend of Reus for the motives of Reus, the answer is the same. Ask Actor for the motives of Reus,—the same gradation, the order only reversed. Ask Reus for the motive which gave birth to the prosecution on the part of Actor; the motive of course is the most odious that can be found: desire of gain, if it be a case which opens a door to gain; if not, enmity, though not under that neutral and unimpassioned, but under the name of revenge or malice, or some other such dyslogistic\* name. Ask a friend of Reus, or an enemy of Actor, the answer is the same. Ask an enemy of Reus, or a friend of Actor, his motive was public spirit, the purest public spirit.

Ask an English lawyer, his answer will also be, public spirit: or if, under the name of revenge or malice, he concludes enmity to have had its share, he requires, in many cases, no other ground for dismissing the prosecution: such is the simplicity of English lawyers, so profound their ignorance of the causes and

\* The word *dyslogistic* is employed by Mr. Bentham in the sense of *vituperative*; as opposed to *eulogistic*.

effects of human actions, and of the difference between the cases in which the nature of the motive is material and discoverable, and those in which it is irrelevant and inscrutable.

Put the same question to a man to whom the springs of action are known, and the mechanism of the human mind familiar, he will scorn to pretend to know what is not capable of being known. He will answer,—desire of gain, enmity, public spirit ;—these motives (not to speak of casual ones) any one exclusively, any or all conjunctively, and in any one of the whole assemblage of imaginable proportions : the proportions never the same for two days or two hours together, nor understood, or so much as enquired into, by the individual himself.

On this part of the ground of evidence, a work replete with instruction would be a collection of cases of prosecutions for perjury ; the cases ranged under heads, expressive of the shape in which the falsehood presented itself, as above. The mischief is obvious and indisputable, if there were any shape in which it could give itself a promise of impunity complete and sure. At first, the prosecutions, it seems natural to suppose, confined themselves to some of the grosser shapes. As human intelligence advances ; in this as or in other lines, the field of punishment will naturally approach nearer and nearer to a complete coincidence with the field of crime.

Hitherto I should expect to find falsehood *in toto* a much more frequent subject for a prosecution of this kind, than falsehood either in *quantity* or in *quality*.

When the word falsehood is mentioned, the

modifications that will be by far the most apt to present themselves, are those ordinary ones which have been already mentioned : viz. those in which the vehicle, used for the conveyance of it, is ordinary language, and in which, falsehood, if tinctured with mendacity, and uttered under the sanction of an oath, is understood to come under the denomination of perjury.

But language, verbal discourse, though the most common and convenient vehicle for the conveyance of ideas, is not the only one. Accordingly, under the head of circumstantial evidence, it becomes necessary to add *deportment*, as a necessary supplement to language.\*

To this head belong the following modifications of falsehood, some of which have been already mentioned.

1. Graphical forgery.—Forgery in relation to written documents: the species of forgery most commonly understood under that name.

2. Monetary forgery.—Forgery in relation to the current coin.

3. Forgery, in relation to evidentiary marks of ownership: *ex. gr.* landmarks: the owner's name upon his linen, or other goods.

4. Forgery, in relation to evidentiary marks of authorship: *ex. gr.* the marks of a manufacturer or vender, upon goods made or sold by him.

5. Forgery of *real* evidence at large: in particular, forgery in relation to the traces of delinquency, under its several modifications.

The Romanists, and after them the English lawyers, in some instances, have ranked

\* See Book V. CIRCUMSTANTIAL.

under the common generical appellation of the *crimen falsi*, forgery (at least in some of the above instances) as well as perjury: falsehood in this *quasi-colloquial* shape, as well as in the shape of ordinary discourse. Of mendacity, except where, by the sanction of an oath, it has been made to receive the denomination of perjury, it has not been common to take notice, either under that or any other name.

## CHAPTER IX.

### GENERAL VIEW OF THE PSYCHOLOGICAL CAUSES OF CORRECTNESS AND COMPLETENESS, WITH THEIR CONTRARIES, INCORRECTNESS AND INCOMPLETENESS, IN TESTIMONY.

IN a tolerably sufficient degree for the various purposes of life,—private and public, domestic, commercial, scientific, political, judicial,—is human testimony in general found conformable to the truth of things. At the same time, in instances but too numerous, it fails of being so. The conformity has its causes: the disconformity has its causes likewise. In a work on evidence, all these causes have a claim to notice. Where mischief, as it is but too apt to be, is the result of such disconformity; *deception*, false judgment, is the name either of the mischief itself, or of the proximate cause of it. And for the prevention of this mischief there is no other course so sure as that which includes the endeavour to avert it by removing or counteracting the operation of its causes.

The enquiry into the causes of trustworthiness and untrustworthiness in evidence, will probably, without much difficulty, be acknowledged to be an interesting pursuit: interesting,

not merely as a field of speculation, but with a view to practice.

But when the mode of applying to practice whatever information may be obtainable, comes upon the carpet, opinions will not, at first view at least, be alike uniform.

The practical uses, and the only uses, which present themselves to my view as proper to be made of it, are as follow :

1. To put the legislator and the judge, as fully as possible, upon their guard against the causes of untrustworthiness.

2. To shew how far and in what instances they are without, and how far within, the reach of remedy.

3. In so far as they are within the reach of remedy, to point out, under the name of the causes of trustworthiness, what are the proper remedies, and in what way they may be employed to the best possible advantage: in such manner as to leave to the causes of untrustworthiness as little influence as possible.

To the above operations, which are but endeavours, the practice of men of law, of judges and legislators, has not been content to confine itself; it has taken a line of conduct presenting the idea of greater efficacy: viz. the excluding from the function of a witness every individual in whose character or situation any mark or symptom of untrustworthiness has presented itself.

The light in which the subject has presented itself to my view, has compelled me to conclude that the idea of exclusion is altogether without foundation in reason and utility: that, though it be employed by lawyers in all nations, no

nations, in this respect, are consistent with one another, nor any one consistent with itself: that the practice is not reasonable in any single instance: that it is mischievous in the exact degree in which it is extensive: that, if in any nation it had been consistently pursued, which however is impossible, it would long ago have given a complete impunity to every imaginable crime, and cut up society by the roots: that, in the minds of its authors, it has its seat,—as far as regards their intellects,—not in any comprehensive, but in a wonderfully narrow, conception of the springs of action, and the mechanism of the mind:—as far as regards their will,—not in attention and anxiety, as might be supposed, but in indolence, negligence, and indifference.

Nevertheless, as a system of law, in which this supposed remedy has not been adopted, and to a greater or less extent employed, is perhaps no where to be found; as the body of prejudice to be put down is thus colossal; it cannot but be perceived that he, who undertakes to overthrow it, cannot make his ground too sure.

For this purpose, and because the practice of exclusion has no better nor other cause than the observation that, in each instance, the testimony of the witness is exposed to the influence of some *motive*, acting upon him in a sinister direction, and soliciting him to deviate from the path of truth; it will be necessary to take a complete survey of the whole catalogue of motives, to the action of which the will of man is exposed. It will thence be seen that, for the same reason for which, in the character of a witness, any one class of persons ought to be

excluded, so ought every other: and that, in the character of a preservative against mendacity, a consistent system of exclusion would be no wiser a remedy than an universal deluge, and without an ark, would be against any other vice.

By the same survey by which the unreasonableness of exclusion is thus indicated, the reasonableness of suspicion will all along be brought to view: and if in this way it be seen to fulfil the double purpose of affording wholesome instruction, and guarding against pernicious error, the labour of travelling through it need the less be grudged.

The application of the lights thus collected, to the subject of exclusion, will be the business of a separate book. In the present book, lest the theoretical survey should in any of its points be suspected of being without use in practice, it seemed necessary to shew that the practical question, as between exclusion and non-exclusion, is the chief mark which it had in view; and that the solution of that question was the chief of the objects to which it owed its birth.

To begin, then: The conformity or disconformity of the testimony of a witness to the truth of things, to the real state of the facts which constitute the subject matter of his report, depends upon the state of his mental faculties: viz. partly upon the state of the intellectual, partly upon the state of the moral or volitional, department of his mind.

Incorrectness and incompleteness in testimony have received different names, according as they are supposed to arise from causes the seat of which is in the intellect, or from causes the seat of which is in the will.

By the supposition, the picture is in some respect or other disconformable to the original. Is the witness completely unconscious of the disconformity? the cause of it is to be found in his intellectual faculties merely: his will has no share in the production of it: the falsehood was not on his part a wilful one. Is he conscious of the disconformity? the cause of it is to be found in the state of his volitional faculty.

But for an act of his will, that picture, which his understanding had represented to him as false, would not have been exhibited by him as true. The falsehood is, therefore, in this respect properly, as in ordinary discourse it is familiarly, spoken of as a wilful one.

In this latter case, and this alone, the falsehood in the language of Roman law is said to be accompanied with *dolus*; i. e. deceit, or at any rate the intention to produce deception—to deceive: with *dolus*; as also with *mala fides*: an inexpressive term, the import of which has been placed out of doubt by use, but of which the connection with its import, and with its synonyme, as above, would not be very easy to make out.\*

*Dolus* remains peculiar to the Romanists: *mala fides*, not to speak of its negative *bona fides*, has been borrowed from them, and been adopted, by English lawyers. Of both of them the use has been extended, from crimes of falsehood, to all other crimes; from delinquency by false testimony, to delinquency in every other mode.

The intellectual faculties concerned in tes-

\* For *mala fides*, say, perhaps, insincerity; for *bona fides*, sincerity.

timony may be comprised under four heads,— perception, judgment, memory, expression; under the latter being included, the use of the corporeal faculties in respect of the sensible signs, audible or visible, by means of which the expression is performed.

When, with reference to the matter of fact which is or ought to be the subject of report, these four faculties are all of them in a sound and perfect state, free from infirmity; correctness and completeness on the part of the testimony, so far as depends upon the state of the intellectual compartment of the deponent's mind, are the result: when in any one of them infirmity or deficiency has place, incorrectness or incompleteness on the part of the testimony is liable to be the consequence: nor, so far as depends upon the state of the intellectual part of the witness's frame, can these defects in his testimony be referable, either of them, to any other cause.

To present a more particular view of the ways in which an infirmity or weakness of which these several faculties are respectively the seats, produces, or contributes to produce, in the testimony of a witness, one or other of these defects, will be the business of the next chapter.

The moral faculties concerned may be comprised under two heads; viz. veracity and attention: adding, or including, their respective opposites or negations, viz. mendacity, and temerity, or negligence: temerity being principally displayed by action, i. e. by utterance; negligence, by forbearance, i. e. by silence.

Veracity has place, in so far as it is the will, the wish, the desire, the endeavour, of the wit-

ness, that his testimony, and the conclusions drawn from it, be conformable to the real state of the case.

Mendacity has place, in so far as it is the will, the wish, the desire, the endeavour, of the witness, that his testimony, or the conclusions drawn from it, be in any respect unconformable to the real state of the case.

As the will can scarcely exert itself, at least with any considerable degree of vigour, but the intellectual faculty must, in a more or less considerable degree, be impressed with a consciousness of the exertion so made by the moral faculty; hence, falsehood, when in this way wilful, is generally, and in a manner of course, in the mind of the witness, accompanied with self-consciousness, with a consciousness of its own existence. The two expressions, *wilful falsehood* and *self-conscious falsehood*, become thus interconvertible and nearly synonymous.

Verity has place, in so far as,—whatever be the state of the will, of the volitional or moral faculty, of the witness, on the occasion in question,—the report made by him concerning them, in and by his testimony, is conformable to the real state of the case.

*Falsehood*, or rather *falsity*, (the word being used without reference to veracity or mendacity), has place in so far as,—whatever on the part of the witness be the state of his will, in relation to the matters of fact in question,—his testimony fails of being conformable to the real state of the case.\*

\* A state of things not frequently exemplified, but by no means incapable of being exemplified, is, when a witness,

Be the *attention* of the witness ever so closely applied to the subject, or ever so anxiously occupied in giving a correct and complete expression to the facts, the image of which is presented by his *memory*; falsity on the part of his testimony may in any degree happen to be the result: *ex. gr.* owing to some infirmity in one or other of the four branches, above mentioned, of the intellectual faculty.

But where, mendacity having no place, falsity has place notwithstanding; it has frequently for its cause a deficiency in respect of that due measure of attention, by which, had it been, as but for his default it might have been, present,

wishing and endeavouring to render his testimony in this or that respect disconformable to the truth of the case, and even believing himself to be so doing, renders it notwithstanding, and in the very same respects, conformable.

In this case his will is in the same vicious state as in case of mendacity; and yet neither falsity, nor consequently mendacity, is the result.

In the system of ethics or moral philosophy taught in some of the English schools, a distinction is taken between *logical* and *ethical* falsehood. By logical falsehood is meant falsehood in general, whether referable to the case of mendacity, as above described, or not: by ethical falsehood is denoted mendacity, as above described.

But, for the case where, as above, falsehood being intended, truth is notwithstanding the result, the nomenclature of that system furnishes not any appellative; unless ethical falsehood unaccompanied by logical, be taken for that appellative.

Of him who, meaning and thinking to utter a falsehood, speaks truth notwithstanding, the act may be considered as an attempt, though an abortive attempt, to commit mendacity: and, in respect of consequences, mischievous consequences, the relation of the inchoate offence to the consummate offence is the same in the instance of this, as in the instance of any other offence, and with equal propriety is susceptible of having punishment attached to it.

the picture given of the fact by his testimony would have been rendered more nearly resembling to the original, to the real state of the case.

The witness has uttered what was untrue; but he was not aware of its being so. Was he in any such situation as called upon him, in regard to justice, before he undertook to give the picture in question, to take measures for assuring himself of the correctness of it,—such measures as, had he taken them, would have saved him from falling into the error, and caused him either to have declared his inability to give any picture of the transaction, or if he gave any picture, to give a true one? If he was, his testimony, though free from the blame of insincerity, is not considered as free from blame altogether. In respect of the judgment, the erroneous judgment, thus formed and expressed by him,—that judgment being, for want of that attention which he might have bestowed and ought to have bestowed upon it, an erroneous one,—blame, viz. the blame of temerity, rashness, is imputed to him, and to such his testimony.\*

\* In the language of the Romanists, *culpa* and *temeritas*. These terms, however, are scarcely so much in use with reference to falsehood, an instrument in the hands of delinquency in general, as with reference to this or that particular species of delinquency. English lawyers have scarce got to the length of this distinction: with reference to delinquency in general, not with any approach to uniformity: with reference to the offence of false testimony, not at all. In a prosecution for perjury, mendacity in judicial testimony delivered upon oath, they know of no medium between self-criminative consciousness and innocence.

In case of falsehood, there is yet another state of the mind which requires notice. In English, the word *bias* is employed for the expression of it: it is the state which a man is in, when he is said to have a *bias* upon his mind. The causes of bias cannot be understood any further than as the causes of mendacity are understood. But to understand it, viz. by means of its relation to mendacity, for the present nothing further is necessary than to understand that mendacity has constantly for its cause some one or more *motives* (motives acting upon the will in a sinister direction, in a direction tending in matters of testimony to produce mendacity), and that bias is produced by the action of these same causes.

*Bias*, then, is a tendency to falsehood in testimony, produced by the same causes as those by which mendacity is produced: a tendency, which, even when reduced to act, is not accompanied with that self-criminative consciousness which is of the essence of mendacity, and which distinguishes it from unmendacious falsehood accompanied or not accompanied by temerity. The mind of Titius is under a bias: his situation exposes him to the action of some motive by which he is urged to depart from the line of truth. He resists the impulse, or yields to it: he adheres to the line of truth, or deviates from it: but, if he deviates, he is not conscious of his doing so: it is not his will, his intention, so to deviate: the falsehood, if there be any in his testimony, is not a wilful one.

When the tendency produced by bias is reduced into act, by the supposition there is

no mendacity in the case, though the effect is produced by the action of a cause of the same nature as those by which mendacity is apt to be produced. Is there, or is there not, *temerity*? The answer is not easy: nor happily very material. Men in general are not so indulgent as to be thus nice. If the testimony of Titius is seen to be exposed to any of the causes of mendacity, and falsehood in any respect is understood to have been the result, such falsehood will not ordinarily be understood to be exempt from blame. The best that can easily happen to it, is, to be understood as accompanied by temerity: most men would be apt to refer it to mendacity, without staying to think of bias.

Bias, being thus nearly related to mendacity, will require little separate mention to be made of it: having the same causes, it has, when it has any effect, the same effects: and (with the exception of punishment, punishment applied in a direct way by appointment of law) presents a demand for the same remedies.

## CHAPTER X.

### OF THE INTELLECTUAL CAUSES OF CORRECTNESS AND COMPLETENESS IN TESTIMONY, WITH THEIR OPPOSITES.

WHEN a statement given of a matter of fact is an exact picture of it, agrees with it in all points, it is then correct, and as correct as it can be : when it fails of coinciding with it in any point, in proportion to the degree of such failure, it is incorrect. Correctness, properly speaking, is not susceptible of degrees : whatever degrees there are in the scale, are degrees of incorrectness.

A statement which, without any intention on the part of the testifier to depart from the truth, is incorrect in any respect, may, as already observed, be either false *in toto*, or false only in circumstance. When it is false *in toto*,—when the picture which it exhibits has not for its original any real fact whatever, or any feature or circumstance of any fact,—it is in that case the mere work of the imagination : of which afterwards. When it is false only in circumstance, —when, though it departs from the original in some points, it has an original from whence it was taken,—the cause of the departure lies, in this case, in one or more of the intellectual

faculties, perception, judgment, memory, or expression, enumerated as above.

In the case of perception, where sight was the sense through the medium of which the cognizance of the fact was obtained, the light in which the object was placed may have been faint; or a part of it only, and not a sufficient part, may, on that occasion, have presented itself to his eye.

In the case of hearing, in like manner, the sounds which reached his ear may have been faint; or, of those which on that occasion were produced by the sonorous body, parts only, and those broken and interrupted, reached his ear: in the case of words spoken, the voice of the speaker may have been faint, the distance at which he stood considerable, and, from one cause or the other, of the words of which the discourse was composed, some excited, some failed of exciting, a distinct perception. And so on through the less instructive and less constantly active senses, the touch, the smell, the taste.

So intimate is the connection between the two phenomena,—the perception, the impression made on the organ of sense,—and the act of the judgment performed in consequence, the inference drawn from the impression, the inference made by the judgment in relation to the supposed cause of it; so prodigious is the rapidity with which, in most instances, the consequent judgment succeeds to the antecedent perception;\* that, by him who has not by some special

\* Conceive a song, sung by a female to her harpsichord, with a bar in it composed of demisemiquavers, or other notes

motive been led to the making of the analysis, the distinction will be apt to pass unperceived.

Among the topics of disputation which, having been handed down from past ages, are agitated, or used at least to be agitated, in the logical schools at the English universities, one is, the question whether sense is or is not capable of being deceived? To give a just answer to this question, the process conveyed to the mind by the words sense, sensation, requires to be decomposed, as above. Deception is an attribute of the judgment only: to have been deceived, is to have passed an erroneous judgment, a judgment more or less disagreeing with the fact. So far then as judgment is not concerned in sensation, sensation is not capable of being deceived. So far as judgment is concerned in sensation, sensation is capable of being deceived. An impression either has been received, or it has not; if it has, there is no deception in that case; if it has not, neither is there any deception in that case. The impression is, in case of sight, the sort of sensation produced by the striking of rays of light arranged in a certain order upon the retina: in case of hearing, the sort of feeling produced by the vibration given to the air by the sonorous body, and, from the air, communicated to the auditory nerve.\*

expressive of the quickest time; suppose her to play and sing from the score, playing constantly either three or four parts at once, and singing at the same time a fourth or fifth: not one of these notes, the production of which has not been preceded by an act of vision, a perception of the musical character, and a judgment declarative of its cause and signification, its relation to the rest of the notes in tone and time, &c.

\* When, by the extrusion of the preternaturally opaque humour of the eye, a person born blind has received his sight at

When the judgment has been rendered erroneous by want of attention, and that defect of attention has been produced by want of interest, that is, of motive; this modification of the cause of error in testimony is to be considered under the head of moral, not of intellectual, causes.

Perception may have been rendered faint or indistinct by old age. Attention may have been rendered indifferent, judgment hasty, negligent, and erroneous, by want of knowledge, general or particular, absolute or relative: the fruit of relative experience, observation, information, and meditation. Want of relative knowledge may be indicated by condition in life, by immaturity of age, and by insanity. False opinion, a still more powerful cause of incorrectness than simple ignorance, may be indicated in some instances by the like marks.

Where the chemist and the physician see a

an age somewhat advanced, at a time when the judgment, so far as it has had ground to exercise itself upon, has been matured; all objects have at first appeared to be equally near. The picture painted on the retina cannot in this case have been different from what it would have been in the case of a person, of the same age, by whom the art of seeing had been acquired in the usual gradual manner. It has been the judgment then, and not sensation, that has in this case been in fault. It is only by degrees, by incessant exercise of the judgment, by comparing the sensation produced by an object at a less distance with the sensation produced by the same object at a greater distance, that the judgment has learnt, with that variable degree of accuracy which belongs to the human judgment in such cases, the art of placing objects at their proper distances.

A sensation similar to that produced by rays of light, may be produced by a different cause; for instance, a slight blow when the eyes are shut, or a galvanic stream. But, though the judgment pronounces the cause of the sensation to be different in the two cases, the sensation itself is the same.

dangerous poison, the kitchen-maid may see nothing more than an immaterial flaw in one of her pans, the cook may behold an innocent means of recommending herself to the palate through the medium of the eye.

Where the botanist sees a rare, and perhaps new, plant, the husbandman sees a weed : where the mineralogist sees a new ore, pregnant with some new metal, the labourer sees a lump of dirt, not distinguishable from the rest, unless it be by being heavier and more troublesome. The same distinction may be pursued through the whole field of social occupation, and through every walk of science.

Under *insanity* are included *idiocy* and *lunacy*: the former a permanent disorder, and thence indicated by permanent marks ; the other an occasional one: the former, therefore, presenting itself with greater certainty to the cognizance of the judge. Lunacy does not so much weaken the judging faculty, as disturb and delude it with false opinions, the product of the imagination ; and thus belongs to an ensuing head. In both shapes, insanity may differ from itself in strength, by an infinity of shades ; few, if any, distinguishable by any exact criterion, or measurable by any applicable scale.

Another intellectual cause of incorrectness in human testimony, is failure of memory. A failure of this sort may have had for its cause, either some original faintness or indistinctness in the act or acts of perception, as above described, or else the lapse of time ; the length of the interval between the point of time at which the fact presented itself to the conception of the witness, and the point of time at which it

happens to him to exhibit his statement of it for the information of the judge.

From the weakness of the memory may result two different, and in some respects opposite, effects :—non-recollection, and false recollection.

Though the *correctness* of the conception entertained of the fact admits of no gradations upwards, yet this is not the case with regard to the *vivacity* of it ; the quality on which its correctness at any subsequent and widely distant point of time so materially depends. Perfect correctness of conception may be stated as a result more usual, more ordinary, perhaps, than any degree of incorrectness : but were it possible to determine the most ordinary degree of vivacity, we should find as many gradations above that mark, perhaps, as below it. The highest point in it might be described as being immediately below that at which a morbid suspension of the sensitive faculty, or a morbid disturbance of the reasoning faculty, insanity, in a word, transient or permanent, would ensue.

Importance in the fact, as above described, is the quality with which the degree of this vivacity will have been connected. This, like the vivacity which is its effect, will be susceptible of all manner of degrees ; above, as well as below, the middle mark. There are some facts (and such are the infinite majority of the whole number of facts observed), so unimportant as to be capable of escaping out of any man's memory the next minute after that in which the perception of them has taken place : there are others, of which the importance, either absolute, or relative with regard to the individual, is so great, that—

unless on the supposition of an almost total decay of the faculty, through old age or disease, it will not be credible that the picture of them should have been effaced out of his memory by any length of time.

As importance may rise to any degree in the scale above the middle, so any degree of faintness that might have been produced by staleness, may have been compensated for by importance.

The importance of the fact may be either intrinsic, or in the way of association merely: viz. in respect of the property it has acquired by the influence of the principle of association, of calling up and presenting to the mind the idea of some other fact, which has an importance of its own. A drop of blood observed in a particular place may serve to indicate a murder: a knife of a particular appearance, found in a particular place, may serve to indicate the person of the murderer. Connected in the mind of a percipient witness with the idea of that atrocious crime, these circumstances will possess the degree of importance due to them: their apparent importance will, in his mind, stand on a level with their real importance. Taken separately and without any such connection, their apparent importance would have been as nothing; and no sooner had they found their way into the conception than they would have made their escape out of the memory. In a butcher's shop, neither the knife nor the blood, neither a few drops of it nor a whole puddle, would have attracted the slightest notice.

Oblivion, forgetfulness, is not the only fail-

ing of which the memory is susceptible: erroneous recollection is another. Without any the least false consciousness as to any point whatever, without any intention or desire of departing in any point from the strict line of truth, a supposed recollection may be false, not only in quantity, quality, or other circumstance, but even *in toto*. I can speak from experience: recollection false even *in toto* is what it has, every now and then, happened to me to detect myself in: I should expect to find this to be the case more or less with everybody. I speak of recollections devoid of all importance, and the expression of which has never gone forth, nor been intended to go forth, out of my own breast: and in respect of which all inducements to mendacity, all causes of bias, have consequently been out of the question.

One circumstance, however, has been common (if in this instance too I do not misrecollect) to all these instances of misrecollection and false recollection: the image of the supposed transaction has been faint and dubious. It has been deduced, as it were, in the way of inference, from some real and better recollected facts, which have operated as evidentiary facts with relation to these false ones. It might be regarded as the work of the imagination, were it not for its having a distinct and solid ground to rest upon in the truth of things.

A proof of the difference has been afforded, when, for the purpose of confirming or disconfirming the truth of a dubious recollection of this sort, I have communicated it to some other person, whose opportunities of observation or means of judgment have appeared to render

him more or less qualified to help me out. By his recollection or opinion my own supposed recollection has been influenced. Supposing his persuasion to a certain degree strong, it has determined mine: my supposed recollection has appeared true or false to me according as it has appeared true or false to him.

On the other hand, when the recollection, the internal evidence, is clear and strong to a certain degree, there is no room left for any such external evidence to operate. To every man recollections must present themselves in multitudes, recollections even of the most ancient facts, against which the evidence of all mankind would not predominate in his breast.

A recollection which is false in circumstance only, may be so, either by being superadded to such parts of the recollection as are true, or substituted to one or more of them. The case of substitution, though the more natural and usual case, is in its description the least simple. It is resolvable into the two opposite modes of falsehood, obliterative and fabricative: a true part of the scene, as it once stood painted, is rubbed out, and a false object painted in the room of it.

A recollection false *in toto*, is as easy to describe and conceive as a recollection false in circumstance. It, however, scarcely admits of being realized. Recollection, if it be recollection, must have had some ground, how narrow soever, in the truth of things, to serve as a foundation for the conception of the false facts. Take away this portion of the true ground, the picture is the work, not in any respect of the recollection, but of the imagina-

tion merely. The original picture is completely rubbed out by the hand of oblivion: and fancy has painted a picture of another imaginary fact in the place of it.

There are two causes, by the influence of which memory may be *refreshed*, and by that means rendered, at the time of deposition, more vivid than, by reason of the joint influence of the importance of the fact and the ancientness of it, it would otherwise be.

One is, intermediate statements: by which are supposed intermediate recollections. The oftener a man has had to give an account of a fact, the less likely he is to have forgotten it, or in any point misremembered it. If in writing, the refreshing touch will naturally have been so much the stronger: inasmuch as the committing of a statement of any kind to writing, calls forth unavoidably a greater degree of attention than the exhibition of it *vivâ voce* in the way of ordinary conversation.

Another is, fresh incidents,—perception of fresh incidents, or receipt of any statement, oral or written, of any fresh incidents,—connected in the way of association with the fact in question. The sight of the spot where I have once met a friend, now far distant, recalls a vivid recollection of the friend himself; and not only of himself, but of what passed between us in that place.

Of intermediate recollections which have not been productive of any fresh statement,—of mere *intransitive* recollections, which have never, through the medium of either the tongue or the pen of the witness, made their way out of his mind,—the effect, though not equal in

degree, will of course be of the same kind. By recollection, even of this silent sort, the picture cannot but have received a degree of refreshment; a degree the more considerable, the oftener this mental operation has been repeated. The circumstance is here mentioned, lest the conception given of the subject should be incomplete; but in practice no application can be made of it.

When the memory of a witness, whose testimony is exhibited in a court of justice, is known to have been refreshed, this circumstance will naturally have a considerable influence on the degree of persuasion produced by his evidence. If the agreement between the two statements be substantially complete, the persuasive force of the evidence may in this way receive considerable increase. If there be any material variance, it will be a sign that, in one or the other of the two statements, the judicial and the prior non-judicial one, there must have been a tincture of incorrectness; accompanied or not by mendacity, as the case may be. And the stronger the degree of refreshment, the less likely the incorrectness to have been unaccompanied by consciousness.

The last of the causes of incorrectness in evidence, above enumerated, is inaptitude of expression. The picture of the fact, as painted in the memory of the witness at the time of deposition, may be ever so correct; yet if the copy exhibited by the words and other signs employed by him for the expression of it be otherwise than correct, such accordingly will be his evidence. By an infelicity in the expression, the fruit of the most correct percep-

tion, and the most retentive memory, may be rendered abortive.\*

On comparing the aberration liable to be produced by inaptness of expression, with the aberration producible by non-recollection or false recollection, the following differences appear discernible.

The aberration by expression seems liable to be more wide than the aberration of the memory. It is capable of giving to the evidence a purport even directly opposite to the true one. The reason is, that a recollection, however false, if it be not false *in toto*, will, in some feature of it, be conformable to the

\* In the history of French jurisprudence, a case, it is said, may be found, in which inaccuracy of expression cost a man his life. A witness, having been examined in the presence of the defendant, and having been asked whether he was the person by whom the act was done, which he had seen done, answered in the negative. Blessed be God, exclaims the defendant, Here is a man—*qui ne m'a pas reconnu*—who has not recognised me. What he should have said—what he would have said, had he given a just expression to what he meant, was—Here is a man *qui a reconnu que ce n'étoit pas moi*—who has recognised, declared, that it was not I.—See Voltaire, “Essai sur les Probabilités en fait de Justice, Politique,” tom. ii.

Entire provinces, and even nations, have been taxed by a common opinion with a sort of endemic inaccuracy of expression. Nations, the most distinguished for talent and genius, may be referred to as examples: and, in the case of these nations, inaccuracy of testimony has been, in an equal degree, the subject of remark. Of this inaccuracy, supposing it to be real, the state of the moral faculties appears commonly to have been looked to as the principal, if not the only, cause: but, in the production of the effect, there seems little reason to doubt but that the state of the intellectual faculties may have possessed a considerable share.

truth: and the improbability of a recollection false *in toto* has already been exhibited. Recollection (as contradistinguished from mere imagination), having its basis in truth, can scarcely be removed from that basis altogether. Expression, on the other hand, has no necessary tie by which the words are confined to any degree of conformity with the ideas they were intended to represent. The aberration is capable in this case of being so complete, that the fact, as actually expressed, may be the exact opposite of the fact as intended to be expressed. In the English language, two negatives, in correct and polished language, are equivalent to an affirmative. In the language of the illiterate classes, they amount frequently to no more than a negative. In the French tongue, negative is added to negative, on many occasions, without reversing the proposition, in the language of all classes.

On the other hand, an aberration arising from this cause does not appear to be altogether so natural, or likely to be so frequent, as an aberration arising from weakness of memory: at least, not to such a degree as to have any considerable effect on the persuasion of the judge. The reason is, that, if the aberration be apparent, it will naturally receive correction from the remarks and questions that in each case may be expected from the judge: whereas a defect of recollection is little capable of receiving any such assistance.

In this respect it stands on a different footing, according to the form in which the testimony is presented to the judge: according as it

is exhibited in writing, or *vivâ voce*. Exhibited in writing, it is less exposed to be incorrect in point of expression; on account of the assistance it will naturally receive from the hands of the professional assistant of the party whose evidence it is, if a litigant party,\* or by whom the evidence was called for:† but in this case it has no chance of receiving correction from the judge. Exhibited *vivâ voce*, it is much more exposed to be incorrect at first utterance, but has the advantage of being open to correction from the judge: viz. either from the judge immediately, or, under his authority, from the professional assistant of one or other of the parties.

Incorrectness from this source, in the course of a *vivâ voce* examination, can, therefore, seldom take place in any very essential circumstance, without some degree of blame on the part of the judge; nor, on that and other accounts, without some degree of blame on the part of the system of procedure.‡

In the case of *vivâ voce* examination, timidity is, perhaps, the most frequent cause of incorrectness in the expression. Of this timidity, the causes of a higher order are principally to be found in inferiority in respect of rank, sex, and age. The degree of it is of course susceptible of an infinity of gradations, according to the idiosyncrasy of the individual. The highest gradations will be found in the case where it

\* As in case of an answer in equity, under the English law.

† As in the case of an affidavit, for or against a motion for an information or attachment.

‡ See Book III. EXTRACTION.

has sex for its cause; especially when that cause is combined with that which results from age. It will be influenced in a very considerable degree by the degree of intercourse which a person has had with the world; by the number of persons whom he has been in the habit of living with; a circumstance of which the influence is perhaps greater in this case than that of *rank*. But, though sensibility of this kind, derived from weakness of sex, immaturity of age, inferiority of rank or of social intercourse, bears, with reference to the phenomenon in question, the relation of cause to effect; it would be an abuse of logic to state the effect in those cases as running in any regular proportion with the degree of the cause. In the female sex, it will also be naturally influenced by condition in life, in respect of matrimony. The sort of person likely to be affected in the highest degree, from the joint influence of all these causes, is probably an unmarried female, about the age of puberty, and a few years afterwards.

Timidity, upon a closer view, will be found to be, on this occasion, neither more nor less than an extraordinary degree of sensibility to the force of the three tutelary sensations, as applying themselves in this instance: viz. the moral, the political, and the religious; but more especially the moral.\*

This timidity will be influenced in a considerable degree by the publicity of the examination: and the error, which is but too apt to arise from this source, is among the inconve-

\* See the next chapter for the explanation of these terms.

niences which require to be set in the scale against the still preponderating advantages which will be seen to result from that cardinal security for truth.

An intellectual cause of incorrectness in testimony, not yet brought to view, and which could not be enumerated among the causes which apply to correctness and incorrectness, because it is applicable to the latter alone, is the imagination, taking the place of recollection.

In weak and undiscerning minds, the simple idea, the mere conception, of an object, be it substance or event, matter at rest or matter in motion, may come to be but faintly discriminated from, may come even to be confounded with, the belief of its existence. At this moment I have in my mind three ideas: one of a hill of pure sand, another of a hill of pure gold, a third of a hill composed of gravel, chalk, and flints, with a miscellaneous intermixture of animal and vegetable remains. The idea of the golden hill is as vivid, as well as distinct, in my mind, as that of the sand hill: it is more so than that of the composite hill. But to the idea of the composite hill, as well as of the sand hill, is annexed an act of the judgment, importing belief—the belief which I am hereby expressing, of the existence of hills, an indeterminate number of hills, of that sort: a belief, the expression of which is a proposition to this effect—Sand hills exist in nature: the idea I have of a sand hill has its archetype in nature. To the idea of the golden hill is annexed, likewise, a proposition analogous to the former, but of the opposite cast:—No hill of pure gold exists in

nature: of the idea I have of a golden hill, there is no archetype in nature. In a weak uncultivated mind this act of the judgment is sometimes passed on any the slightest evidence; on what, to a stronger and more exercised mind, would seem no evidence. Put into the hands of a child of three years old, under the name, not of a story-book, but of a book of natural history, a book in which the existence of golden hills is assumed, as well as that of sand hills; the judgment of belief will, in his mind, as readily attach itself upon the existence of the one sort of hill as upon that of the other. Shew him at a little distance a hill covered with grass, and tell him that under the grass it is all solid gold; and let nobody in his hearing ever intimate any suspicion to the contrary; the belief of the existence of a golden hill may thence-forward present itself to his mind as having been demonstrated to him by the evidence of his senses.

Of the false facts presented to the imagination, and, at the same time, presented under the guise of real ones at the time, the only ones the experience of which is common to everybody are the facts presented in dreams. In infant minds, minds as yet but little exercised in the art of applying attention to the operations of the judgment,—the distinction between the state of waking and the state of dreaming, between the waking and the dreaming thoughts, is for some time so faint as to be occasionally evanescent. In my early childhood, at a time when I was just able to go up and down stairs alone, being at the top of the staircase, and having made a false step, it seemed to me that, in-

stead of falling headlong and rolling down the stairs, I felt myself gently wafted, as it were, from top to bottom, and there landed safe, my feet not having come in contact with anything the whole time. At present I have no more difficulty in recognizing these sensations to have presented themselves in a dream, than anybody else would have: but I have all along preserved a distinct recollection of a time, and a time of considerable duration, during which the imaginary scene was accompanied in my mind by a belief of its existence. To this recollection is superadded a recollection of my communicating to some person, but I forget whom, the relation of this incident, as an adventure not more extraordinary than true. Had a dream to this same effect been dreamt by Wesley, the recollection of it would, probably, have remained numbered among his real recollections to the end of his life. In his journal are contained the histories of more than one adventure, in which the deviation from the laws of nature is little, if anything, more considerable. A text, which that incident used not unfrequently to recall to me, might, with the help of a Wesleyan imagination, have been unalterably associated with the conceived event:—"He shall give his angels charge over thee, to keep thee in all thy ways; they shall bear thee up in their hands, lest thou dash thy foot against a stone." Such was the passage in one of the songs of David,\* as quoted to his divine descendant by the devil:† and although, among the attributes of that mysterious

\* Psalm xcii. 11, 12.

† St. Matthew, iv. 6. St. Luke, iv. 10, 11.

personage, he numbers that of being *the father of lies*,—for this time, at any rate, his quotation was correct. An angel holding the favourite infant by the hand as it glided down the staircase, might have added neither an unapt, nor an unnatural, embellishment to the scene.

Thus fugitive and precarious, in an unformed mind, is the distinction between the mere conception of an object, and the belief of its existence: thus apt is the judgment embracing and including the image, to be confounded with the image alone. In this sort of confusion we may behold a principle which not only took possession of, but contributed largely to the generation of a system in, the mind of the sceptical and sagacious Hume. Belief of the existence of an object, is, according to him, neither more nor less than a certain degree of vivacity in the idea introduced by the object into the mind. By what kind of photometer shall that degree of vivacity upon which belief attaches, be distinguished from those fainter ones to which no such act of the judgment is annexed?

Between the ages of eight and nine, the metamorphoses of which Ovid is the historian, and the prodigies of Jewish history (such was, and such continues to be, the course of instruction at the royal school of Westminster) were presented together to my tender and susceptible mind. On the one hand, the devil in a variety of shapes,—on the other hand, the scenes in Ovid (Baucis and Philemon, I remember, for one) would ever and anon present themselves to my dreaming, as well as my waking, thoughts. Which was the more agreeable class, I well

know; which was the more lively, I could not engage to say. Yet, under this uncertainty in respect of superiority of vivacity, in respect of belief there never was any the smallest doubt. Parental solicitude was too steadily at its post to suffer any the smallest confusion to prevail in those tints by which belief, disbelief, and conception pure from each, are characterised and distinguished.

The reader will approve or disapprove, as it seems good to him, this exhibition of egotistic evidence, in a case which admits not of any other.

If, in a susceptible and unformed mind, the mere idea of an object is found to operate as sufficient evidence of its existence; much more frequently will it be sufficient, when the way for its reception in that character has been prepared by popular opinion operating in favour of it, in the character of a mass of remote indeed, but most extensive, and thereby impressive, circumstantial evidence. Hence it is that those terrific spectres, ghosts, witches, devils, and vampires, which, for the last time let it be hoped, have haunted the seat of justice, have not yet ceased to haunt the garret and the cottage.

Under the head of imagination, that is, under the head of incorrectness of testimony considered as flowing from that source, it was necessary to introduce the world of phantoms. The occasions on which false evidence, created by the imagination, has in this way had religion for its source, have been but too frequent. The cases in which false evidence, pure from all mix-

ture of mendacity, has been generated by the imagination, without the benefit of any such supernatural assistance, will hardly be to be found.\*

There are two cases, in which the result produced is simple incorrectness, pure, or nearly so, from mendacious consciousness, but of which, nevertheless, the causes belong to the moral department. These are, the case of *bias*, a case that has already been slightly brought

\* The sort of work here in question—the production of false, yet unmendacious evidence—may be styled the extraordinary work of the imagination. The ordinary work consists in exhibiting, for the purpose of amusement, facts, which had indeed no archetypes in nature, but which are known by the individual operator to be in that case, and are not seriously exhibited by him as true, either to a judge, acting as such, or to anybody else. This ordinary work of the imagination has, consequently, nothing to do with evidence, and is altogether clear of those pernicious effects with which its extraordinary work is so apt to be attended. Novel-writers and poets must not be confounded with false witnesses.

Another work, which may also be reckoned among the extraordinary works of imagination, is the exact converse of the one at present under consideration. In the case of false evidence produced by this cause, facts having no existence are averred seriously to exist: in the other case, facts really existing have imagination for their cause. I speak of the class of effects which make so conspicuous a figure in the history of medicine: diseases, sometimes removed or suspended, sometimes produced, by the influence of belief upon the mind; mere belief, without any ground in nature. In this belief, religious opinion has, in some instances, had a share: but instances are much more numerous in which, in the production of the effect, that hyperphysical power has had no share.

I need only allude to animal magnetism, which obtained so many partisans at one time in the capital of France; and to the metallic tractors, which had about the same time so much vogue in this country.

to view; and the case of *indolence*—the case where the departure from the direct line of truth has a sort of unconscious indolence for its cause.

To what end, the above analysis? To the following ends:—

1. To give a view of the cases in which falsehood is incapable of being prevented.
2. To save the judge from imputing mendacity where there is none; where there is none of that false consciousness which is essential to it.
3. To facilitate the recognition of mendacity where it exists:—a task which will be the easier, the clearer the light in which the characters of simple incorrectness are presented.
4. To give assistance to that one of the parties who has truth and justice on his side, whose interest it is that the truth should be brought to light, by suggesting to him topics for investigation and examination.

So obvious are most of the considerations above presented, so much in the way of every body's observation, that, under the name of instruction, they have scarce any pretension to be of any use. But, what a man has had in his mind, he has not always at hand at the very moment at which it is wanted: what conveys no instruction, may serve for reminiscence.

Minute and trivial as the distinctions may be, the sketch was necessary, to complete the anatomical view which for this purpose it was necessary to give of the human mind. In corporeal anatomy, to trace out the ramifications of the nerves was no amusing operation, but

not the less a necessary one. Hunter, the Garrick of lecturers, would sometimes turn it over to his assistant Hewson, but he never would have held himself warranted in omitting it.

## CHAPTER XI.

### OF THE MORAL CAUSES OF CORRECTNESS AND COMPLETENESS IN TESTIMONY, WITH THEIR OPPOSITES.

**SECTION I.—***The moral causes of correctness and completeness in testimony, with their opposites, are motives.*

Of action, (including, in so far as it is the work of the will, inaction, or forbearance), of action, in whatsoever shape displayed, the efficient causes are *motives*; and it has no others that are perceptible.

Utterance of testimony is action. Whatever verity there is in testimony, is therefore produced by motives: and again, whatsoever mendacity there is in testimony is also produced by motives. Even when the result of mere temerity or negligence, and therefore not referable to the head of mendacity, falsity may be referred to motives: that deficiency of attention, of which the falsity in question is the result, being itself the result either of the love of ease, (an article having, as will be seen, an

indisputable title to a place in the catalogue of motives), or, at any rate, of the absence of some motive, by which, had it been present, the requisite degree of attention—the degree requisite to the production of correctness and completeness—would have been produced.

A *motive*, is the idea or expectation of good or evil:—of good, as eventually about to result from the mode of action or conduct with reference to which the idea or expectation of it operates as a motive; of evil, as eventually about to be produced by the opposite mode of action or conduct.\*

*Motive*, being a conjugate of *motion*—*motive*, (though the only word in ordinary use for the purpose of expressing the efficient cause of the mode or line of conduct observed by a man on every given occasion), is, in its import, too narrow for the purpose: for, be the result *action* or *inaction*,—motion, (whether of the physical or psychological faculties,) or rest,—and, in case of Offences, for example, be the offence produced an

\* As to *good* and *evil*, neither have the objects respectively signified by those words any value, nor the words themselves any meaning, but by reference to *pain* and *pleasure*.

By the word *good*, where it has any determinate meaning, is meant, either a determinate lot of pleasure; or the absence of a determinate lot of pain; or the chance, or the *efficient cause*, of a determinate lot of pleasure, or of exemption from a determinate lot of pain; or some combination of advantage, in any of these different shapes.

By the word *evil*, in like manner, is meant, either a determinate lot of pain; or the absence or loss of a determinate lot of pleasure; or the chance or *efficient cause* of a determinate lot of pain, or of the absence or loss of a determinate, and not in every event unobtainable, lot of pleasure; or any combination of disadvantage in any of these different shapes.

offence of the *positive* or the *negative* cast; an appellative for the designation of the efficient cause of the effect thus produced, is alike necessary.

To supply the deficiency, either such a signification must be added to the signification of the word *motive* as involves a sort of contradiction in terms—a motive producing, not motion, but the absence of it, viz. rest; or some other appellative, simple or composite, must be employed instead of it: simple, as *determinative*; compound, as *principle of conduct*, source of conduct, efficient cause of conduct.

*Rest* being the result of the absence of motives; action, positive action, being, when motives are present and operating, the more usual and more conspicuous result of such their operation; hence, to designate the efficient cause of action, the word *motive* came *originally*, and, for want of conceptions sufficiently clear and comprehensive on the part of moralists, has continued *exclusively*, to be employed. Of imperfect conceptions, imperfect expression has, throughout the whole field of conception and language, been the necessary result.

The relation borne by the signification of the word *interest* to the signification of the word *motive*, has, on this occasion, been rendered a necessary object of attention, and a necessary subject of explanation, not only by the use made of it in common language, but by the use made of it, and the gross and pernicious errors propagated by means of it, to so prodigious an extent, and with such baneful effect, by lawyers.

Correspondent to every species of pain or pleasure, is a species of motive; correspondent to every species of motive, is a modification of interest.\*

A *motive*, is an *interest*, considered as being in a state of action; as being, on the occasion in question, actually exerting its influence on the mind of the individual in question.

An *interest*, is a *motive*, considered in an abstract point of view: viz. as possessing the faculty of being called into action, but without presenting to view any particular occasion in which it is considered as employing itself in the exercise of such faculty. When the word *motive* is employed, the object designated by it is in general not considered as pointing any further than to the particular *good* which is considered as being in view. Interest, when I say *such is my interest*, or, *it is my interest to do so and so*, points not only to the attainment of that

\* The word *interest*, and the word *motive*, are, or at least might and ought to be, exactly co-extensive: the difference being no other than what consists in the difference between the sets of words respectively necessary to make them up into a sentence. A man has an *interest* in doing so and so, when, by the force of some *motive*, he is urged to do so and so. The interests corresponding to the self-regarding sorts of motives, are, it is true, the sorts of interest most commonly in view where the word *interest* is employed. But to give the use of the word the extension which is requisite for the purpose of conveying just conceptions, and of which it is not unsusceptible, it must be extended so as to take in the dissocial motives, and even the purely social motives. *L'intérêt de la vengeance*, (or *vindictive interest*, as it may be rendered in English,) is an expression already familiar enough in the French language: and why should I not be permitted and admitted to take an *interest*, though it be not a self-regarding one, in the prosperity of mankind, my country, my profession, my party, or my friend?

good, but to the general effect of that event upon the sum of my well-being.

The word *interest* is used in an abstract sense, viz. for the purpose of designating either some particular species of interest, but without designating what, or every species of interest without distinction, or all taken together: this acceptance is wanting to the word *motive*.

The word *sinister* is applied as an epithet indifferently to the word *interest* or to the word *motive*. Employed in the way it usually is, it leads to error; conveying the intimation that there are particular species of interest to which the property thus designated belongs, viz. either constantly, or incidentally, but in both cases to the exclusion of others. The truth, however, is, that there exists not any species of interest, any sort of motive, in which this property may not occasionally be found. By a *sinister* interest or motive, is meant an interest or motive that acts in a *sinister direction*, i.e. that excites or leads to evil; an interest or motive, by the force of which a man is prompted or excited to engage in some evil line of conduct: but there is not any species of interest, any species of motive, to which it may not happen to act in this, as well as in the contrary, direction.

If this part of the field of language were filled up upon any regular and complete plan; opposite and correspondent to *sinister*, as applied to interest, we should have *dexter*, as applied to the same subject: forasmuch as interest is no less apt to lead to good than to evil. As every man has a right side as well as a left side, so, in heraldry, every scutchcon has a *dexter* side as

well as a *sinister* side: but the language of psychology, though a science rather more useful than heraldry, is not equally well provided.

Of the three classes, to one or other of which, all pleasures and pains, consequently all motives, may be referred, viz. the *self-regarding*, the *social*, and the *dissocial* or *anti-social*; the word *interest* is more frequently applied to designate those of the self-regarding class than those of either of the two others: and among those of the self-regarding class, most frequently of all to that which stretches over so much larger a portion of the field of action than any other of them, viz. the love of money.

Accordingly, this is the only species of interest which the man of law, at least the English, recognises under that name. *Good*, he knows of none but money: *evil*, he knows of none but the want of money: *interest*, he knows of none but *pecuniary* interest: *interest, motive, passion*, he knows of none but the love of money.

Accordingly,—be it as it may in regard to other transgressions, to offences, to crimes, committed by other means, by the aid of other instruments,—*mendacity* is a transgression to which, according to his conception of the matter, no man can be engaged by any other modification of interest than *pecuniary* interest: nor is there, according to him, that particle of this sort of interest, so impalpably small, to the force of which, if exerted in exciting him to mendacity, it lies within the sphere of possibility that he should oppose an effectual resistance.\*

\* See Book IX. EXCLUSION.

Of this error in theory, the practical consequence (it will be seen) is no less than perpetual injustice, with that perpetual insecurity, and that perpetually renewed affliction, which are among the fruits of it.

In the objects designated by the words *pleasure* and *pain*, we see two articles, of which the importance does not seem much exposed to be undervalued, or the nature very liable to be misunderstood.

By reference to pleasure and pain; the word *motive*, in all its several acceptations, and the species of objects comprised under that genus, in all its several modifications, receive, now at least, (and, so far as concerns the subject of *evidence*, now for the first time), a clear and determinate signification. So many distinguishable sorts of *pleasures* and *pains*, so many distinguishable sorts of motives.

On the one hand, veracity, and, so far as depends on attention, verity—on the other hand, mendacity—being the result of determinate motives or combinations of motives;—what remains, so far as the *will* is concerned in the production of those opposite results, is—to observe; on the one hand, in what cases, and in what manner, the efficient causes in question operate in the beneficial and desirable direction indicated by the words veracity and verity, that is, in favour of correctness and completeness; on the other hand, in what cases and in what manner, the *same* efficient causes (for in both instances they will be found to be at bottom the *same*) operate in the pernicious and undesirable direction indicated by the word mendacity.

Considered in the character of an efficient cause of veracity and verity in testimony, a motive of any description may be termed a veracity or verity-promoting, or mendacity-restraining, motive.

Considered in the character of an efficient cause of mendacity or bias, and thence of falsehood, a motive of any description may be termed a mendacity-prompting, exciting, or inciting, motive.

On these definitions may be grounded a sort of aphorism or axiom, which, in the character of a help to conception and to memory, may be not altogether without its use. On every occasion, the probability of veracity, and thence, so far as depends upon *will*, of correctness and completeness in testimony, is as the sum of the force of the mendacity-restraining to the sum of the mendacity-exciting motives.

## SECTION II.—*Any motive may operate as a cause either of veracity or of mendacity.*

Of the causes of mendacity and veracity, the list is the same as that of the causes of human action: no action so good or so bad, that it may not have had any sort of motive for its cause. This is what has been already stated, and, if I mistake not, put beyond doubt, by a general survey of the whole stock of motives, elsewhere.\*

No action, good or bad, without a motive: an action without a motive, is an effect without a cause. Yet men stand excluded by whole shoals and classes from the faculty of being

\* "Introduction to the Principles of Morals and Legislation." Chapter 10. MOTIVES.

made to serve in the character of witnesses, for no other reason than their standing exposed to the action of this or that species of motive!

No action, good or bad, or even of the class of those termed indifferent (a class which, strictly speaking, has no existence\*)—no action whatsoever without a motive. To actions of atomical and almost invisible importance, correspond motives of atomical and equally invisible force.

To judge whether a motive be capable of giving birth to mendacious testimony exhibited in a court of justice, it will be necessary to observe what sort of result it must be that is expected to ensue from the evidence in question; that is, from the decision which will naturally and properly be grounded on that evidence, taking it for true. Applying this test to the several sorts of motives, we shall find that there is not one of them that is not capable of giving birth to mendacious testimony: that there is not one that would not, in certain cases, be necessarily productive of that effect, supposing the force of it to be unchecked by that of any other motive or motives. As there is no sort of pleasure or pain to which it may not happen to a man to be subjected, in consequence of the decision of a court of justice; it follows of course that there is no sort of motive by which he may not be urged to do whatever is in his power, towards procuring the decision by which the pleasure in

\* Whatever act affords any the minutest particle of satisfaction, of pleasure, or removes or prevents any the least particle of pain, is, in so far, good. In this case are the great majority of human acts, even in the instance of the most atrocious malefactor that ever lived.

question may be secured to him, or the pain averted. And unless the force of any such motive be counteracted by a stronger motive, it will of course lead him to commit mendacity in that view, if mendacity be the most probable means which occurs to him of effecting his object.

As in the whole catalogue of motives, there is none which is not capable of producing mendacity, so in the whole catalogue there is none, the force of which is not liable occasionally to act upon the mind in a direction tending to ensure its adherence to the line of truth.

On the same individual occasion, a motive of the same kind, operating on different persons at the same time, may prompt one of them to speak true, the other to speak false.

Take the motive of self-preservation: self-preservation from legal punishment. In the character of defendants on a criminal charge, two persons are under examination. One of them is innocent: his interest is manifestly to speak true: every true fact he brings to view that is pertinent to the object of inquiry, operates in his favour in the character of circumstantial evidence. The other is guilty: the true facts, if brought to view, would operate towards his conviction, in the character of articles of criminative circumstantial evidence: accordingly, under this apprehension, he either suppresses the mention of them, or denies their existence, substituting or not substituting in the room of them false facts of his own invention, adapted to the purpose.

On the same individual occasion, the self-

same motive, operating on the same person at the same time, may prompt him, in relation to one fact to speak true, in relation to another to speak false.

The guilty defendant is under examination as before. Various questions are put to him, tending to draw from him the admission or the denial (say the admission) of so many various facts. These facts are all true; all of them in their tendency operating against him in the character of circumstantial evidence. Within the compass of twenty-four hours, suppose he was at four different places specified. Self-preservation is his object, an object he is willing to purchase, and at any price. In regard to three of the four facts, mendacity, he sees clearly, presents not the smallest chance of being of use: these facts, he understands, will be proved against him by other evidence; and mendacity, being thus detected, would operate against him in the character of a criminative circumstance. The fourth, he hopes, may not be thus capable of other proof. What in this case will he do? He will admit the three first facts, and in respect to those facts, speak true: he will deny the fourth, and, in respect to that, speak false.

Mendacity or veracity will in each instance be the result, according as, in that particular instance, the force of the mendacity-promoting, or say seducing, motives, or that of the veracity-insuring, or say tutelary, motives, is the strongest.

There is no species of motive but what is capable of existing in, and acting with, any

degree of force, from the lowest to the highest, or, at least, a degree in practical effect equal to the highest.

There is no species of motive, of the effective force of which, in any given instance, any tolerably grounded estimate can be formed, without a survey made of the several influencing circumstances in the situation of the witness, on which the effective force of the motive depends: which survey cannot be completely made without a *vivâ-voce* examination taken of the witness himself, having for its object the bringing of those circumstances to light.

There is no one species of motive, of the effective force of which, any certain prediction can be made, even after a survey taken, and taken in the best manner, of the several influencing circumstances above-mentioned.

Although there be some species of motives of which the force is upon a medium considerably greater than that of others; yet, as they are capable of acting, each of them, according to circumstances, with any degree of force from the highest to the lowest, it is impossible to form any tolerably well-grounded prediction with respect to the comparative probability of mendacity or veracity, from the mere observation, that, on the occasion in question, the witness is subjected to the action of this or that species of motive.

These two axioms cannot be too often repeated.

No species of motive but is capable of operating in the character of a mendacity-exciting cause.

With but slight exception, and with none

that is worth noticing for this purpose, no species of motive but is capable of operating with any degree of force.

In the non-observation of these fundamentally important truths, lies the main root of the exclusionary system, already spoken of—that system of misrule, the exposure of which in detail is one of the principal objects of this work.

### SECTION III.—*Of the four sanctions, considered as causes of trustworthiness or untrustworthiness in testimony*

By interests and motives, so far as depends upon the state of the *will*, are (as hath been seen) produced, in so far as it happens to them to be produced, correctness and completeness in testimony. By those same psychological powers, so far as depends upon the will, are, on the other hand, produced, in so far as it happens to them to be produced, the directly opposite qualities, incorrectness and incompleteness.

But, in each pair, the opposite qualities are in such sort opposite as to be mutually incompatible. Incapable of existing both of them in the same instance; in each instance, which is it that shall have place?

All depends upon the occasion: of the two opposite sets of forces, on one occasion we shall see the one set prevail, on another occasion the other.

One leading distinction, however, may be remarked at the outset. Of the tutelary forces, the efficient causes of correctness and completeness, the operation (as will be seen) is

constant—operating on all occasions: while, of the seductive forces—the efficient causes of incorrectness and incompleteness—the operation is but casual, brought about by particular incidents and situations.\*

The general prevalence of correctness and completeness over the opposite qualities in testimony, is a matter of fact out of the reach of dispute, and a state of things, the existence of which may be regarded as indispensably necessary to the existence of mankind: it is to the general predominance of the tutelary forces over the seductive, that this prevalence of truth over falsehood is to be ascribed.

Be it in the *correct* direction, or in the *sinister* and *seductive* direction that it acts—it is still by *interest*, operating in some shape or other in the character of a *motive*, that (so far as depends upon the state of the will) the state of the testimony in respect of correctness and completeness is produced. But whether it be the act of giving testimony, or any other sort of act, that constitutes the occasion on which they are considered as operating; these forces, considered in respect of the direction (viz. the straight direction) most frequently and habitually assumed by them, have in another place† been considered as acting in various groupes; to each of which groupes the name

\* By a tutelary motive is meant, any motive, which on the occasion in question prompts the person in question to do right. By a seductive motive, any motive which prompts him to do wrong.—See Introduction to the Principles of Morals and Legislation; Chapter 10, MOTIVES.

† Introduction to the Principles of Morals and Legislation.

of a *sanction*, in conformity to a usage already found established, has been attached : the principle of combination being, in each instance, the source from whence the pains and pleasures acting thus in the character of interests and motives, are seen or supposed to flow.

According to this principle of division, there are four distinguishable sanctions : the *physical*, the *legal* or *political*, the *moral* or *popular*, and the *religious*: which three last may, in consideration of the seat of the pains and pleasures immediately belonging to them, be comprised together under the collective appellation of *psychological*.

To the *physical* sanction may be referred all pains and pleasures which are capable of being produced, and habitually are produced, by the operation of causes purely natural ; without the intervention of any of the powers, from which the pains and pleasures belonging to any of those other sanctions derive, or are supposed to derive, their existence.\*

To the *legal*, or say the *political*† sanction

\* Under this head must also be included, (although, the seat of them being in the mind, the sanction belonging to them should in that respect be referred to the psychological class), all such pains and pleasures as consist in, or are attached to, the *expectation* of pains or pleasures purely physical. For, strictly speaking, it is not so much by the physical sensation, as by the prospect of it, that the effect in question, produced on human conduct, is produced.

+ [*Legal* or *political*.] -Though in general the objects designated by these epithets will be found to coincide, the hand of law being the hand mostly employed by political government in the distribution of good and evil on the score of reward and punishment, more especially on the score of punishment; they are not however absolutely identical: the

may be referred all such pains or pleasures as are capable of being expected at the hand of law and government: pains, which, expected from that quarter, and considered as expressly designed to influence action, assume the name of *punishment*: pleasures, which, expected from that quarter, and considered as designed to influence action, assume the name of *reward*.

As there is scarce a pain or pleasure, whether of the physical class or the psychological, which may not immediately or remotely be produced by the hand of political power, and thus assume the shape of punishment or reward; hence it may be understood, that the circumstance, by which the pains and pleasures capable of emanating from the legal or political sanction, are distinguished from those of the physical, is, not so much the nature of the sensations themselves, as the *quarter* whence they are looked for, the *source* from which they are expected to flow.

To the *moral*, or say the *popular\** sanction,

political sanction comprising in its extent the whole mass of good and evil capable of being distributed and applied by the hand of government. Good and evil, especially good, are capable of being distributed, and in practice are distributed, by the hand of government,—and that not only on other scores, but even on the scores of reward and punishment, especially reward—by other hands than that of *law*; at least, by others than that of the judge: and this not only, as they are but too apt to be, improperly, but to a considerable extent even consistently with strict propriety—especially on the score of reward.

\* [Popular or moral.]—*Popular*, in respect of the persons at whose hands the pains and pleasures, the good and evil in question, are expectable: viz. the members of the community at large, acting in their individual and private capa-

may be referred all such pains and pleasures as are capable of being expected at the hands of the community at large—that is, of such individual members of it, within the sphere of whose action it may happen to the condition of the individual in question, in his supposed character of *witness*, to be comprised: such individuals acting, on the occasions in question, in pursuance of whatsoever liberty of indifference is left to them by the law; and accordingly, at pleasure, rendering, or forbearing to render, to him, any such services as they are left at liberty to render or to withhold at pleasure; and producing on his part, or forbearing to produce, any such uneasinesses as, in his instance, they are in like manner left at liberty to produce at pleasure.

From the catalogue of the pains referable to this sanction, are obviously excluded all those severer pains which, for their infliction, require the uncontrollable and irresistible hand of law. But, with this exception, the pains as well as pleasures referable to this sanction, and emanating from this source, may be said nearly to coincide with the pains and pleasures referable to the artificial source just mentioned. When

city, and not any of them, as in the case of the political sanction, in the character of public functionaries: *moral*, in respect of the degree in which the rules of action received in the character of rules of *morality*, rules for the government of moral conduct (abstraction made of the force of law, and the other motives referable to the political sanction), depend upon this sanction for their observance. Abstraction made of the force of the political sanction, and of that of the religious, it is by the popular sanction, as above described, in conjunction with the physical, that human conduct in all its modifications is determined.

*negative* action is taken into the account as well as *positive*,—*negative* action, to which much greater liberty is, and in the nature of the case must be, left by law than to *positive*; it will be seen that, of the pains to which a man can be subjected by law, there is not one to which, in a way more or less immediate, it may not happen to a man to be subjected by the free agency left to individuals: viz. in this sense, that, by means of some service or other which it was left free to them to render or not, he might by this or that individual have been preserved from it.

To the religious sanction are to be referred, all such pains and pleasures as are capable of being expected at the hands of an invisible Ruler of the universe.

In so far as the pains and pleasures expected from this supernatural source are regarded as eventually liable to be experienced in the present life, they comprehend and coincide with the aggregate multitude of the pains and pleasures belonging to the other sanctions: in so far as they are regarded as liable to be experienced in a life to come, they are inconceivable and indescribable as the Being from whose hand they are expected to emanate.

#### SECTION IV.—*Operation of the physical sanction, for and against correctness and completeness in testimony.*

In the case of the political, popular, and religious sanctions; among the pains and pleasures respectively belonging to them, there is not one, the expectation of which is not capable of operating in the character of an

efficient cause of, or at least a security for, correctness and completeness in testimony: since, in all these several instances, the production of the pain or pleasure in question in the bosom of the supposed witness, is the result of a *will* different from, and extraneous to, his own; the will of some *other* being or beings: and in each case, among the several pains and pleasures, the production of which is in the power of the being in question, it depends upon his will to apply, in the case in question, whichever of those forces he pleases.

In the case of the pains and pleasures of the physical sanction, in so far as applying to the purpose here in question; no such extraneous will, nor indeed any will at all, taking any part in their production; the only pain or pleasure that has place, is one that grows of itself, out of the nature of the case. This, it will be seen, is a pain only; and this pain, the pain of labour (mental labour), or exertion: and the *motive* corresponding to this pain, is the *love of ease*.

To relate incidents as they have really happened,\* is the work of the memory: to relate them otherwise than as they have really happened, is the work of the invention. But, generally speaking, comparing the work of the memory with that of the invention, the latter will be found by much the harder work. The ideas presented by the memory present themselves in the first instance, and as it were of their own accord: the ideas presented by the invention, by the imagination, do not present themselves without labour and

\* I mean as, to the narrator, they have really appeared to happen. With this explanation, the expression *as they have really happened*, may be used instead of the more correct expression, to save words.

exertion. In the first instance come the true facts presented by the memory, which facts must be put aside : they are constantly presenting themselves, and as constantly must the door be shut against them. The false facts, for which the imagination is drawn upon, are not to be got at without effort : not only so, but, if, in the search made after them, any at all present themselves, different ones will present themselves for the same place : to the labour of investigation is thus added the labour of selection.

Hence an axiom of mental pathology, applicable to the present case : an axiom expressive of a matter of fact, which may be stated as the primary and fundamental cause of veracity in man. The work of the memory, is in general easier than that of the invention. But to consult the memory alone in the statement given, is veracity : mendacity is the quality displayed, so far as the invention is employed.

The love of ease,—in other words, the desire of avoiding the pain of mental exertion,—is therefore a motive, the action of which tends, on every occasion, with more or less force and effect, to confine the discourse of a man within the pale of truth.

But the pain which in this case acts on the side of veracity, which acts as a sort of punishment attaching upon the first tendency and leaning towards the path of mendacity—which acts, therefore, as a sort of restrictive force, confining the discourse within the path of truth,—is a punishment which arises immediately and spontaneously out of the offence ; which arises of itself, without need of the interposition of the will of any other being, divine or human, to ap-

ply it, as in the case of the other three sanctions. The sanction to which this pain, this motive, belongs, is therefore that which has been termed the physical. It is the same sanction by which a man stands prohibited from striking his hand against the edge of a knife, or holding it in the flame of the candle.

Such would be the case, even if the chance in favour of correctness rested on no other basis than the influence of the physical sanction, as above described, taken by itself. But when the influence of the moral sanction is brought upon the carpet, the disproportion receives an ulterior increase.

The act of reporting as true that which is not true,—such a transgression of the line of truth, even when not attended with a consciousness of the departure, is a mode of conduct against which the moral sanction points its censure with a certain degree of force: much more, when the departure is regarded as attended with that vicious consciousness. The labour of invention, consequently, is increased: since the story must be framed, not only so as to answer a present purpose, by deceiving the person to whom it is addressed, but, if possible, so as not to draw down upon the inventor the pain of public disesteem, by being subsequently discovered to be false.

The axiom above brought to view is not a mere barren speculation, but of very high importance with reference to practice. Applied to English law, it will serve to justify the admission of a class of evidence which of late years has been admitted, but which in former times had been excluded. I mean the testimony of

non-adults of a tender age. Is the child sufficiently instructed in regard to the nature and consequences of an oath? Upon the ground of this question has the decision, with regard to the admission or rejection of the child's testimony, been customarily placed. In another place, I shall have occasion to show the fallaciousness of such ground. In return to the suddenly put and unforeseeable question that will be respectively grounded upon each preceding answer,—is it, under these circumstances, most likely that the memory, or the invention, shall on each occasion be the fund to which, for the matter of each respective answer, he will have recourse? Of the two, this would seem to be the more reasonable question.

In the matter of fact of which the above axiom is the expression, we already find a cause adequate to account for the predominance of veracity over mendacity: a cause, of the due consideration of which, the natural tendency will be to confirm or increase our confidence in human testimony, independently of whatever security for veracity may be afforded by the influence of the three other sanctions.

Children (says a proverb one sometimes hears) children and fools tell truth. There is something offensive in the proverb: there is a sort of immoral turn in it, a sort of intimation, as mischievous as it is false, of a natural connexion between veracity and folly. On the first mention of it, one conceives it to have had for its author a species of knave, who, as such, is a species of fool; for, though all folly is not knavery, yet there is no knavery

that is not folly. When the covering of immorality and folly is stripped off from it, its foundation, however, appears to be laid in nature. It had been observed as a matter of fact, that veracity in man was more frequent than mendacity, truth than falsehood : that this frequency was particularly great among such classes of persons as, by the complexion of their understandings, were less sensible to the action of a distant interest; such as that sort of interest commonly must be, by which, on occasions of importance, such as those which come before a court of justice, a man can be influenced to step aside from the path of truth. By the first impulse, by the impulse of the universal principle above delineated, by a sort of instinctive impulse, the line in which a man's discourse is urged is invariably the line of veracity—of truth: it is only by reflection, reflection on the distant advantage supposed to be obtainable by falsehood, that a man's footsteps can be turned aside out of that line.

Whatsoever be its direction ; in the absence of all rival powers, the love of ease, minute as is the greatest force which, on these trivial occasions, can be applied by it, is in every instance omnipotent, the power that worketh all in all.\*

\* The extreme minuteness of the quantity of labour, the desire of avoiding which, composes, in this case, the motive or determinative force, ought not to be considered as constituting any objection against a theory which consists in nothing more than the simple enunciation of a few indisputable facts. It is by forces thus impalpably minute, that the whole system of psychological conduct is regulated and determined. In a material balance, constructed as some

But,—that, in every instance, to the insuring of verity in contradiction to falsity, the force of this commanding principle applies itself;—to this proposition, before it can be brought to an exact coincidence with the line of truth, some limitation, and that not an inconsiderable one, will require to be applied.

To prevent the testimony from being false *in toto*, will, indeed, require less exertion than the opposite course: but to render it, and in every circumstance, a correct and *complete* picture of the fact, will, at the same time, frequently require more exertion than, without some degree of uneasiness, could be bestowed. In proportion as the balance inclines to this side, here then, supposing the result to depend on the physical sanction alone, here would be a mixture of truth and falsehood.\*

have been known to be constructed, one five-hundredth part of a grain has been known to be sufficient to determine the descent on either side: and were it not for *friction* and the *vis inertiae*, a five-millionth part would be equally efficacious.

\* Operating by itself, the efficiency of the physical sanction is not altogether so sure in regard to the production of completeness in testimony as in regard to the production of correctness. Production of completeness requires *attention*, viz. attention directed to that purpose: to attention, as well as to invention, when raised to a certain pitch, exertion, labour of mind, is necessary—labour, over and above what is necessary to the giving expression to imperfect fragments. Here then is a force, which, to be overcome, requires an exciting force over and above what is sufficient to produce correctness. This exciting force cannot be any other than that of some special *interest*. If, then, no such interest is acting upon the mind, completeness, unless by accident, will not have place: the testimony, how correct soever, as far as it goes, will not, to the purpose in question,—will not, to the purpose of preventing deception,—be complete.

The possibility of incompleteness will, it is evident, be

The result is, that, under the physical sanction, (supposing its force the only force in action), so far as depends upon *will*, falsehood *in toto* would never have place; falsehood in circumstance would be frequent: truth would, in every case, constitute the ground; but that ground would be frequently receiving a tincture of falsehood: and, the more complex and extensive the ground, the deeper and more extensive would the tincture be naturally apt to be.

Thus far no interest is supposed to have place, other than that weak, though, in default of all opposing interest, adequately-operating interest, the interest created by the aversion to labour. But let the case be open to any other interest—to any other motive—acting in a sinister direction; there is not any *species* of interest so weak, the force of which is not capable of existing in a degree sufficient to overcome the correctly-acting force of the physical sanction, and in such sort that falsehood, even *in toto*, shall be the result: all these motives, however, act more frequently on the side of truth than on that of falsehood.

The more particularly the nature of human intercourse comes to be considered, the more thoroughly we shall be satisfied that it is not by the general and standing interests alone, but by the particular and fleeting interests of each moment also, that the property of truth is

greater and greater, in proportion to the complexity of the matter of fact which constitutes the subject of the testimony: and if the probability of incorrectness, in respect of such parts as are reported, receives increase also from the same cause, still the ratio of increase will not, in regard to incorrectness, be so great as in regard to incompleteness.

secured to the general tenor of human discourse. In particular, it is only by making known, and that truly, something that he thinks, that a man can obtain what he wants. For a number of years, reckoning from the commencement of the power of locomotion, we are all necessarily subject to the perpetual exertion of the power of command. But the power of command can obtain its gratification on no other terms than by the most correct adherence to the line of truth. By every act of command, a desire is made known; and, in proportion as the desire fails of being truly stated, it is certainly frustrated.

**SECTION V.—*Operation of the moral or popular sanction, for and against correctness and completeness in testimony.***

Happiness, in almost all its points, is, in every individual, brutes scarcely excepted, the most brutish savages not excepted, more or less dependent upon knowledge: the word *knowledge* not being on this occasion confined in its application to the knowledge of those recondite facts, which belong to the domain of *science*. But in all cases, except that of a life carried on, from beginning to end, in a state of perfect solitude, knowledge depends in the largest proportion upon testimony: and, except in those cases of comparatively rare occurrence, in which falsehood itself serves to lead to truth,\* it is only in so far as it is expressive of truth, that testimony is productive of knowledge.

\* See Book V. CIRCUMSTANTIAL, Chapter 5.

All the confidence we can ever have, or hope to have, in mankind, either under the law or without the law,—all the reliance we can place on the expectation we entertain of any of the innumerable and daily services, obligatory or free, which we stand in need of for the sustentation and comfort of our existence,—all depends, by a connection more or less close and immediate, on the preponderance of men's disposition towards the side of veracity and truth.

The force of the moral or popular sanction coinciding in the main with the force of general interest; hence it is, that, throughout the whole field of intercourse between man and man, in every state of society (the rudest not excepted), the moral or popular sanction is, with only here and there a casual exception, found in action constantly on the side of truth.\*

Of the degree of force with which the moral or popular sanction acts in support of the law or rule of veracity, a more striking or satisfactory exemplification cannot be given, than the infamy which so universally attaches upon the character of liar, and the violent and frequently insupportable provocation given by any one who, in speaking to, or in the presence of, another, applies to him that epithet.†

\* Of the moral or popular sanction, however, except where the force of it is assisted by interrogation,—of the moral or popular as well as of the physical sanction, and from the same causes, it may be observed, that it acts with less efficacy in the production of completeness than of correctness.

† Like other imputations, this imputation is not the less galling, but apt rather to be the more galling, to a man, from his being conscious of its being merited, and thence of the probability of its being known to be merited. Accordingly, no two characters are more naturally united, in the

There has not, I suppose, existed anywhere, at any time, a community,—certainly there exists not among the civilized communities with which we have intercourse, one, in which the appellation of a liar is not a term of reproach. Among the most egregious and notorious liars that ever existed, I cannot think that there can ever have been a single individual to whom it must not have been a cause of pain, as often as it happened to him to hear the appellation applied to himself; to whom it would not have been matter of relief and comfort, had it been possible for him to have disburthened his character from the load of it.

Such is the power of the moral or popular sanction, when applied to extra-judicial testimony: to that sort of discourse which has place between man and man in the miscellaneous intercourse of life.

But the force with which it acts in behalf of truth, is applied with much more energy, as well as with much more constancy, when (the importance of truth being the same in both cases) the testimony is of the judicial kind: delivered on a judicial occasion; or even when not delivered on a judicial occasion, if delivered in contemplation of its being eventually applied to a judicial purpose.\*

same person, than the liar and the bully: the function of the bully being to give protection to the liar.

The man who, on hearing imputed to him a supposed act of mendacity,—instead of endeavouring to shew the groundlessness of the aspersion,—challenges him from whence it came,—gives up the reputation of veracity, as it were in barter, for the pleasure of revenge, and the reputation of courage.

\* As in case of pre-appointed evidence. See the book so entitled (Book IV).

In the main, and upon the whole, the force of the moral or popular sanction acts in a direction favourable to general happiness and virtue. In the main, accordingly, the direction taken by this same force is favourable to that particular branch of virtue which consists in veracity.

But, to the proposition by which this predominant tendency is announced, ere its limits can be brought to coincidence with the line of truth, considerable exceptions will require to be made.

One capital exception has for its cause the repugnancy, the inbred and irremovable repugnancy, that exists between the aggregate mass of the precepts by which it prescribes good conduct in general and prohibits vice in general, and that particular precept by which it prescribes veracity, and reprobates the opposite vice.

Avoid vicious conduct, conduct prejudicial to the general interests of the community of which you are a member, yourself included; avoid vicious conduct, or the ill opinion, and consequent ill will and ill offices, of the community, will attach upon you. Avoid vicious conduct in every shape, and in the several shapes of mendacity, and falsehood through culpable inattention, among the rest.

Thus far, we have the result of its action on the side of virtue. But now comes its action on the side of vice. Whatsoever vicious conduct it has happened to you to fall into, conceal it at any rate from the public eye: for it is only in proportion as it falls within the compass of the knowledge or suspicion of the public, that the evil consequences held up to view will take place. But, by him, by whom,

vicious conduct is confessed, it is not concealed : by him, by whom after it has taken place it is denied to have taken place, it is or may be concealed ; in so far as it is in the power of mendacity to conceal it.

No really existing person could, with truth and propriety, be represented as delivering on one and the same occasion these repugnant precepts. But if the word *precept* be on this occasion employed, and the form of a precept given to the discourse in which it is employed, it is in pursuance of one of those unavoidable metaphors to which language is so frequently compelled to have recourse. What there is of strict reality in the case, consists of two motive forces, two interests, acting at the same time in opposite directions on the human mind : and between these motive forces the opposition in question may be seen actually to have place. By confessing what he has done, the individual in question would expose himself to shame : but by denying what he has done, he also exposes himself to shame.

Acted upon as he is by these two opposite forces,—by which of them will the line of his conduct, in regard to testimony, be determined? By that one of them by which, at the moment in question, the interest of the greatest *value* is presented to his eyes : certainty and proximity, those two never-to-be-overlooked dimensions, being taken into the account of value.

On this occasion (let it not be forgotten) the question is, not what is most fit and proper, but what is most likely, to be done. The dilemma, be the occasion what it may, is a distressing one. By one only course may the

dilemma be avoided. Avoid vice in other shapes, and the temptation to plunge into mendacity for the hope of escaping from that shame which follows at the heels of vice, will not assail you: such is the advice in which the virtue of veracity joins with the other virtues.

Of the other exceptions to the truth-promoting tendency of the moral sanction, the origin may be seen in the opposition between particular interests and general. The force of the moral sanction, of the popular sanction, taken in its greatest extent, is composed of the general interests of the community at large. But, in every political community, smaller communities or aggregations of individuals will be found; each aggregation having an interest common to all its members, but opposite to that of the all-comprising aggregate to which they all belong: and to every such partial though still composite interest, to every such section of the community, corresponds a section of the popular or moral sanction, and of the moral force with which it acts.

A sort of honour is to be found among thieves. So it has often been observed, and truly: but this honour is neither more nor less than a disposition to pursue that interest, to be impelled by that detached portion of the general moral force, by which the members of the predatory community in question are bound together. The whole community has its popular or moral sanction upon an all-comprehensive scale; the several communities of thieves, smugglers, and all other communities having particular interests acting in opposition to the general interest—all those recognized, or not recognized, as being

included in the more comprehensive class or denomination of malefactors,—have each of them a sort of section of the popular or moral sanction to itself.\*

It is the interest of the community at large, that truth alone should be uttered; that the language of mendacity and deception should be abstained from, on every judicial occasion, and on almost every other occasion: abstained from, although, and for the very reason that, the commission of it threatened to be beneficial to the particular interests that act in opposition to the general interests:—to the common interests, for example, of thieves and smugglers.

It is the interest of the community that truth should be revealed, as often as the disclosure of it *promises* to be conducive to the bringing down of punishment upon the heads of thieves and smugglers. But it is the interest of thieves and smugglers that truth should never be revealed, but always concealed, as often as the disclosure of it *threatens* to be conducive

\* Instances in which particular classes have joined in making one moral rule for their conduct among themselves, another and a totally different rule for their conduct towards all other persons, are not unfrequent. Such is uniformly found to be the case, where particular classes are possessed of so much power, as to be in a great degree independent of the good or ill opinion of the community at large. In the moral code of the West India slaveholders, many acts which would be among the worst of crimes if committed against a white man, are perfectly innocent when the subject of them is a negro. For white and black, substitute Mahomedan and Christian, and the same observation holds good with respect to Turkey. Substitute orthodox and heretic, it at one time held good in all Catholic, not to say in all Christian countries; as well with regard to the other virtues in general as to that of veracity in particular.—*Editor.*

to the bringing down punishment on the heads of thieves or smugglers. Among these malefactors, therefore, the section of the moral sanction, which applies to testimony, prescribes mendacity, while it prohibits, and, as far as may be, punishes, veracity, as an act of vice and treachery.

In any community, composed of thieves or smugglers, is any act of depredation committed by one member to the prejudice of the rest? The force of the moral sanction changes now its direction, though not its nature: the force of this section of the popular sanction now joins itself to that of the whole. Mendacity is recognised as a vice; veracity, as a virtue.

The interest which these communities of malefactors have in mendacity, would not, however, have succeeded in perverting the moral feelings of the great bulk of the community, who have no interest but in the universal prevalence of veracity; had not the sinister interest of thieves and smugglers found to this purpose a powerful auxiliary in the sinister interest of lawyers.

Under every system, every mercenary lawyer—under the fee-gathering system, every lawyer without exception,—has an interest, as unquestionably, though not as uniformly, opposite to the general interest, as that which forms the bond of union in communities of thieves or smugglers. Under that system, every lawyer without exception, the whole fraternity together, with the judges at their head, have a particular interest in common with the interests of malefactors and wrong-doers of every description—not excepting thieves and smugglers. It i

their interest that lawsuits,—understand those and those alone which are pregnant with fees,—lawsuits, by whatsoever name distinguished, action or prosecution, may abound to the utmost pitch. That prosecutions may abound, it is their interest that crimes of all sorts may abound: that actions may abound, it is their interest that wrongs of all sorts may abound: as well those wrongs of which the hand of the judge is the pretended avenger, as those of which it is the unacknowledged instrument. It is their interest that wrongs of all sorts be sometimes punished, lest plaintiffs be discouraged, and the mass of litigation and profit be diminished at one end: it is their interest that wrongs of all sorts remain sometimes unpunished and triumphant, lest the mass of litigation and profit be diminished at the other end. It is their interest that every modification of vice, by which litigation with its profit can be produced, may abound; and thence, in a more especial degree, that mendacity, the instrument and cloak of every vice, may abound.

Neither to thieves, nor to smugglers, nor to wrong-doers in any other shape than that of judges, has any such power been given as that of granting impunity, and, by means of impunity, licence, to the vice of lying: accordingly, neither by thieves, nor by smugglers, nor by wrong-doers of any other denomination, has any such licence been ever granted.

Judges, under favour of the oscitancy or connivance of the legislature, have given to themselves that power: and such is the use they have made of it, that the whole system of judicial procedure is one continued tissue of lies:

of allowed, protected, rewarded, encouraged, and even necessitated, lies.

In this instance, as in every other, power, in proportion to its magnitude, serves as a shield as well to every vice as to every crime. Contempt is that modification of the punishment of the moral sanction, that is more particularly attached to the character of liar: and power, in proportion to its magnitude—power, though it affords not protection against hatred, affords it effectually against contempt.

Hence it is, that, as well the mercenary advocate, whose trade and occupation consist everywhere in the sale of lies, as, under the fee-gathering branch of the English system of procedure, the fee-fed judge, who deals in the same ware,\* remain untouched by that infamy, with which, if the dictates of the popular sanction coincided uniformly with the dictates of general utility, they would be covered; and by which the occasional and unprivileged liar, whose lies are many hundred times less frequent, is overwhelmed. The power constitutes a vantage-ground, by which the head of him who is stationed on it is raised above the flood in which the undistinguished, but less guilty, herd, are drowned.†

\* Not that they deal (either of them) in lies and nothing else: the ware they deal in consists in a mixed assortment of truth and lies, made up in whatever proportions happen best to suit the purpose of the customer. In what proportion, would, to the manufacturer and dealer, be matter of indifference, were it not that, of the two sorts of ware, lies are that by which his skill is most conspicuously displayed.

† To the advocate, as such, belongs no such power, no such coercive power, as that which constitutes the cha-

Thus, by the incessant action of comparative knowledge upon invincible ignorance, has the force of the moral or popular sanction been divided and turned against itself. In correspondence with this schism, the aggregate mass of mendacious testimony has been divided, in the contemplation of the public, into two parcels: whatsoever portion the judge has found it more for his advantage to punish than to permit or to reward, remains in a state of proscription as before, and is continued under the denomination of vice: whatsoever portion he finds it more for his interest to reward, or to permit, than to punish, is regarded either with indifference or with approbation, and is ranked under the denomination either of innocence or of virtue.

Mendacity is not only permitted, but in some cases properly permitted, by the moral sanction. That cases exist in which a departure from truth is, and ought to be, either prescribed, or at least allowed, by the moral or popular sanction considered in its true and largest sense, is out of dispute. Being in many instances cases of considerable intricacy and delicacy, it happens, fortunately, that, to the purpose of the present inquiry, any very particular description of them is neither necessary nor pertinent.

1. In some cases, departure from truth is prescribed by the moral sanction as a duty: such are all those in which mischief to another would be the certain or probable effect of verity, while from falsity no evil at all, or at least no

racteristic attribute of the judge: but it is by the tongue of the advocate that the hand of the judge is moved: the power of the advocate, though in respect of intensity less in degree, is in specie the same with the power of the judge..

equal evil, will, with equal probability, be the result: as, if a madman or assassin, with a naked weapon in his hand, asks whether his intended victim be not there, naming the place where he actually is.

2. To this same head may belong falsehoods of *humanity* or beneficence, as when a physician, to save pain of mind, gives hopes which he does not entertain himself.

3. To this same head may be referred what may be termed falsehoods of *urbanity*; which is but humanity or beneficence applying itself to interests of inferior moment: as where, on being interrogated by Artifex concerning the degree of estimation in which he holds a production of Artifex,—for fear of applying discouragement, Crito gives for answer a degree higher than that which he really entertains: and so in regard to conduct in life, taste, and so forth.

4. As to cases in which departure from truth is *allowed*, without being *prescribed*; a footing on which this matter is commonly placed seems to be, that, where a man has no right to the information sought by him, the information need not be given to him. But granting, that, were probity, or the duty of one man to another, the only consideration to be attended to, a liberty thus ample might and would be allowed; the latitude will be found to receive very considerable limitation, when those considerations are attended to, which concern a man's self-regarding interest, and belong to the head of *prudence*.

So dishonourable and pernicious to a man is the reputation of habitual or frequent falsity,—

so honourable and so valuable to him that of never having violated truth,—that, without the least prejudice to any other individual, by even a single departure from veracity, it may happen to a man to do irremediable mischief to himself.

The wound thus given by a man to his own reputation will be the more severe, the more intense and deliberate the averment by which the truth is violated: and thus it is, that, after a falsehood of humanity or urbanity, uttered with a faint or ordinary degree of assurance,—if urged and pressed, stronger and stronger asseverations being on the other part called for in proof of the verity of the preceding ones, a man may, for the preservation of his own character, find it necessary to give up the enterprise of humanity or urbanity, and declare, after all, the naked truth.

A disquisition of no small length and intricacy might be employed on the subject of the exceptions proper to be made to the general rule of verity: a disquisition, curious and interesting at any rate; but, whether subservient or not upon the whole to the interests of morality and happiness, would depend upon the manner in which it was conducted.

#### SECTION VI.—*Operation of the legal sanction, for and against correctness and completeness in testimony.*

The force of the moral sanction was found insufficient to secure good conduct in general: it was found necessary to add to it the force of law.

The force of law itself cannot be applied but

through the instrumentality of testimony ; and testimony is of no use but in so far as it leads to truth. The same deficiency which produced the necessity of adding the force of the legal to that of the moral sanction, for the purpose of securing good conduct in general, produced the necessity of applying the same auxiliary force to the particular purpose of securing that particular modification of good conduct, which consists in attaching the good qualities of veracity and verity to whatsoever testimony comes to be delivered on a judicial occasion or for a judicial purpose.

Many and extensive are the portions of the field of law, in relation to which the popular sanction has nowhere as yet, nor (till it has received that sort and degree of improvement which it may yet for a good while have everywhere to wait for) will it, so fashion its dictates, as to bring them to an exact coincidence with those of the principle of general utility. In relation to those same portions of that field, the regulations of the legal sanction are naturally and generally found to approach nearer than those of the popular sanction to so desirable a coincidence. The quarter in which this deficiency is most conspicuously observable, is that which regards those transgressions which are properly termed public ; viz. such offences, by the mischief of which, though it be seen to hover over the heads of the whole community, no assignable member of that community is seen to be afflicted.\*

\* Take for example any of that infinite variety of offences, the mischief of which consists in the defalcation which they

One of the advantages of the political, as compared with the moral sanction, is the greater constancy with which it can avail itself of interrogation; an operation which, in many instances, is indispensably necessary to the verity of testimony, more particularly in so far as concerns completeness. In some instances, this security may chance to have been applied in such sort that the force of the moral sanction may have had the benefit of it: some individual or individuals, willing to apply this instrument, and so circumstanced as to be able to apply it with effect, being at hand at the moment at which the testimony is delivered. But the application of this instrument is an act of power: and it is only in the hands of the administrator of the force of the legal sanction, it is only in the hands of the judge, that power of this description is sure at all times to be found.

The force of the political sanction, like that of the moral sanction, may be considered to be one of the standing causes of veracity: standing counter-forces, acting in opposition to mendacity. Like that of the moral sanction however, and from the same cause, it is capable of being by accident brought to act on the adverse side.

Punishment, legal punishment, is, in every civilised country, annexed to mendacity in judicature. But wherever the effect or tendency of true testimony would be to subject the dependent to any obligation of the burthensome kind, whether on the score of punishment, satisfaction

make from the public revenue. That these offences are not treated by the moral sanction with so much severity as they deserve, is notorious, and the cause is equally plain.

to be rendered to a party injured, or right to be conferred on the adverse party; so much of the occasional force of this sanction is made to act in opposition to its regular and standing force. In every such case,—abstraction made of every other species of motive; whichever of the two antagonizing forces of the same sanction, its standing force and its occasional force, happened on each occasion to be the greater, (certainty and proximity, as well as intensity, of the punishment, being taken into account on both sides), on that side human conduct would be sure to be found. If, for example, the offence for which a man were under prosecution, was a species of fraudulent obtainment, the punishment of which consisted of transportation for three years; while the punishment for the perjury, in case of his answering falsely while under examination on that occasion, was transportation for seven years; and the probability of conviction appeared exactly the same in both cases; abstraction made of all other motives, veracity in this case ought, in every instance, to be regarded as certain: while, on the other hand, all things remaining as before,—if, instead of transportation for three years, the punishment for the fraud were transportation for fourteen years, perjury might in every instance be set down for certain in this case, as veracity was in the other.

This is the casual operation of the legal sanction, to the prejudice of truth: but many instances there are in which it is made to operate in that mischievous direction by design.

If the administrator of the force of the legal sanction had all along and everywhere been faithful to his trust, the application made of

that force to judicial testimony would have been uniform and proportionable: applying itself to all cases in which it happened to such testimony to be delivered; and in a degree regulated by the quantity of force, which the opposing force to be surmounted, and the importance of the case (that is, the magnitude of the mischief liable to take place in the event of falsity on the part of the witness; and consequent deception and misdecision on the part of the judge), required.

But, under every civilized government that has had existence, the administrator of the legal sanction has, as will be seen, been in this particular unfaithful to his trust. Everywhere, at first by the inexperience, and consequent ignorance and unskilfulness, afterwards by the oscitancy, or corrupt connivance, of the legislator, the formation of the law of evidence has, along with that of so many other branches of the law, to so immense an extent, been abandoned to the judge. Left without allotted recompense by the indigence, the penuriousness, or the improvidence of the legislator, and at the same time with powers adequate to the practice of extortion without stint, the judge has in every country converted the sword and scales of justice into instruments of fraud and depredation.

Having been suffered to convert all judicial demands into a source of profit to himself, he has applied himself to the multiplication of unjust demands: having been suffered to convert all judicial defences made before himself into a source of profit to himself, he has applied him-

self to the multiplication of unjust defences: having been suffered to convert all judicial expense into a source of profit to himself, he has applied himself to the multiplication of judicial expenses: having been suffered to convert all judicial instruments, and all judicial operations, into sources of profit to himself, he has applied himself to the augmentation of the magnitude and multitude of judicial instruments, and of the multitude of judicial operations. Beholding in delay an encouragement to unjust demands, as well as unjust defences, and at the same time, on the occasion of all demands and defences without distinction, a source of incidents which beget occasions or pretences for additional instruments and additional operations; he has applied himself in like manner, with equal energy and success, to the multiplication of delays.

Beholding in mendacious statements a pretence for the reception and entertainment of unjust demands, of unjust defences, of useless expenses, of needless and useless instruments and operations, and of groundless delays (sources of those needless and useless expenses, instruments and operations), he has occupied himself in cherishing with one hand that mendacity, which he has been occupied at the same time in punishing with the other. Attaching punishment to those unprivileged lies, in which individuals at large, in the character of suitors, or in other characters, have been concerned by themselves; he has attached reward to those lies in the utterance of which they have employed, as accomplices or substitutes, his subor-

dinate instruments and partners: and, lest with all these lies there should not be yet enough,—having been suffered to convert his own lies into a source of profit to himself, he has multiplied his own lies, lies signed by his own hand, without limit and without shame.\*

In holding up therefore to view the force of the legal sanction in the character of a tutelary force, utterance was given to a general rule, of a nature not to be reduced within the limits of truth, till after it had been cut into by extensive and numerous exceptions: for, if it were to be held up in the character of a force uniformly and faithfully exerted on the side of truth, regard would be to be had not to what it is, or ever has been, but to what it ought to be, and is so generally, though so erroneously, supposed to be.

I say, supposed to be; for among the delusions which inbred mendacity has, from first to last, been occupied in propagating with so much industry and success, in none has it been more completely successful than in persuading the people, in contradiction to their own eyes and their own feelings, to mistake impunity for purity, and prostrate themselves before the den of mendacity and of depredation, as if it were the sanctuary of truth and spotless justice.

The effect of this perversion of the legal sanction, in occasioning a correspondent perversion of the moral sanction, has been brought to

\* See the work entitled, "Scotch Reform opposed to English Non-reform;" see also Book VIII. of the present Work.

view in the last section. But this is not the only ravage committed by an abuse of the legal sanction upon the force of the moral, even in that part of the field that belongs to testimony.

To an abuse of the power of the political sanction, the nature of things admits of no other check than the resisting force of the moral or popular. A determination to destroy this only check, and thus render the power of the political sanction, by whatsoever vile hands wielded, completely arbitrary, has been not only indefatigably prosecuted, but openly avowed. Judges have been found so insensible to the voice of censure, or so secure of not incurring it, as to maintain for law, and thus to establish for law, that,—when misconduct in any shape is, in any printed and published or written and communicated paper, charged upon a man in power, themselves not excluded,—the truth of the charge, so far from being a justification, shall be deemed to operate as an aggravation; and, so far as depends upon themselves, shall operate in aggravation of punishment; of that punishment by which, and which alone, at the command of shameless despotism, the quality of guilt is impressed upon meritorious innocence.

That the triumph over truth may be the more complete, a definition of the sort of instrument called a libel, is said to have been given—a definition which requires but to be consistently acted upon, to level whatsoever difference may exist between the constitutions of Britain and Morocco. A libel is any discourse, by which, it being put into writing and made public (whatsoever is to be understood by public), the feelings

of any individual are hurt, injured, violated, wounded, or whatsoever other word it be, that, to answer the purpose of the moment, is presented by the powers of harmony to the rhetoric of despotism. Not that, by this law, the manufacturers of it would wish to be understood as the less friendly to the interests of truth and liberty: for, so often as twelve men, under the name and character of petty jurymen, can be found to join with one voice (speaking upon their oath), to declare their persuasion that the feelings of a malefactor receive no hurt from his seeing himself held up to view in that character—in other words, that it is matter of indifference to a man, guilty or not guilty, whether he be thought criminal or innocent—in a word, that, whether innocent or guilty, man in general has not any such sense belonging to him as the sense of shame; so often are they at liberty to save him who has been ruined by prosecution, from being ruined over again by punishment.

Towards destroying altogether the force of the moral sanction, the most extensively operating security for individual good conduct, and the only effectual security against the despotic tendency of power; towards rooting out of the human bosom all regard for truth, and at the same time for liberty and virtue; it seems not easy to say how, with any encouragement from public blindness, it would be possible for the artifice or audacity of usurped legislation to go further.

In such a state of things; under a legislation that connives at such usurpation, and a people

that submits to it without remonstrance ; it is a question not altogether exempt from difficulty, whether the force of the moral sanction is or is not with propriety to be numbered among the powers by which human conduct in general, and in particular so far as regards the truth of testimony, is influenced and directed. To-day, yes : and so long as the acquiescence under such law continues to be regarded as short of certainty : to-morrow, perhaps not : to a certainty not, a single moment longer than the design manifested by such doctrines shall continue unaccomplished.

#### SECTION VII.—*Operation of the religious sanction, for and against correctness and completeness in testimony.*

In the case of this sanction, as of the others, its utility, in the character of an efficient cause of truth in testimony, depends partly upon the *direction* in which, partly upon the degree of *force* with which, it acts.

In respect of its direction, nothing can be more favourable, more steadily and uniformly favourable : provided always, that, in the case of *book-religions*, the original and authentic repositories of the rule of action be taken for the standard, not any glosses that in later ages may have been put upon them.

On considering the differences, the very wide differences, observable between the several book-religions in other respects ; an observation that would be apt enough here to present itself, is, that, in this respect likewise, any proposition

that were to be predicated of them in the lump, would possess but a feeble chance of being true.

But in this particular, causes, viz. interests and motives, being in all religions the same, effects, viz. precepts and other actions, will naturally, not to say necessarily, fall into the same coincidence. Taking in a certain sense for the author of the religion, the penman by whom the discourses, constitutive of the matter of it, were committed to writing; in the instance of every one of them it may with equal truth be observed, that his interest, in respect of the object he had in view, required that the disposition to veracity should, on the part of his adherents, be as strenuous and as uniform as by any means it could be made.

In the case of a leader of this sacred, as in the case of a leader of any profane, description, the success of his designs would be in no small degree dependent upon the correctness of such information, of such testimony, as, on such an infinite variety of occasions, that design might lead him to require at their hands.

In the Jewish religion, the story of the leprosy of Gehazi; in the Christian, the story of the sudden death of Ananias and Sapphira; may serve for illustration.

If there were any decided difference, the steadiness of the religious sanction to the cause of truth would be found more rigorous and entire, not only than that of the legal sanction, of which the unsteadiness has above been brought to view, but even than that of the moral. The moral sanction acknowledges the exceptions that have been seen; it has its false-

hoods allowed, if not prescribed, of urbanity, its falsehoods of humanity, and even its falsehoods of duty.

The religious sanction, if the Jewish (which to a great, though undefined extent, is at the same time the Christian) be taken for an example, and the text of the sacred writings be taken for the standard of that religion, acknowledges no such exceptions. When Jephthah, the chief of that religion, having vowed in case of victory to sacrifice to the Lord the first object that presented itself, and having beheld in his own daughter that first object, "did with her according to his vow," it was for no other reason than that he had said upon his oath that he would do so, though unquestionably without having, in so saying, had her in his thoughts. Not only humanity, but duty, even parental duty, were on this occasion held to be considerations of inferior moment, when compared with the duty of adherence to truth, that duty having been reinforced by the ceremony of a vow, of that solemn appeal which is common to oaths and vows.

Though the text of the sacred writings, the text recognized in all ages as the standard of obedience, remains in all ages the same, or nearly the same, the interpretation put upon it varies from age to age: and, in each age, it is by the interpretation put upon it in that age, that the effectual direction taken in that age by the religious sanction, the practical effect produced by it, is determined. The age in which the text of the sacred writings was first committed to writing, was not, in the instance of any of the book-religions, an age in which any

such qualities as those of precision, accuracy, and particularity of explanation, belonged in any considerable degree to the public mind. To reduce the precept to a state adapted to practice, it has become more and more the custom to fill up from the precepts of the moral sanction, the reputed deficiencies manifested in these particulars by the religious sanction. In a delineation, which at this time of day should come to be given, of what the religious sanction prescribes in relation to truth and falsehood; the exceptions above mentioned as applied by the moral sanction to the general requisition of veracity and verity—the particular allowances as well as counter-prescriptions made by the moral sanction, in favour of the several classes of falsehoods, designated as above by the several appellations of falsehoods of duty, falsehoods of humanity, and falsehoods of urbanity,—would probably not be omitted.\* But, whether proper or otherwise,

\* Mr. Bentham might have quoted, in illustration of this remark, the following passage from Paley—a writer of undisputed piety, who, in a system of morals professing to be founded upon the will of God as its principle, makes no difficulty in giving a licence to falsehood, in several of its necessary or allowable shapes.

"There are falsehoods which are not lies, that is, which are not criminal; as, where the person to whom you speak has no right to know the truth, or, more properly, where little or no inconvenience results from the want of confidence in such cases; as where you tell a falsehood to a madman, for his own advantage; to a robber, to conceal your property; to an assassin, to defeat or divert him from his purpose. The particular consequence is, by the supposition, beneficial; and as to the general consequence, the worst that can happen is, that the madman, the robber, the assassin, will not trust you again; which (beside that the

it is in the law of the moral sanction only, not in the law of the religious sanction, as delivered in the text of either the Jewish religion or the Christian (not to speak of the Mahometan), that any of these exceptions are to be found.

Cases, however, in which the force of the religious sanction has operated on the side of perjury, even in Christian countries, are neither impossible, nor without example. Paris, no longer ago than the middle of last century,—Paris, so lately, not to say at present, the centre of unbelief,—yielded a batch of false miracles, regularly attested, vying in extraordinariness with the less-regularly-attested prodigies of Jewish history. In the testimony by which these false miracles were proved, it is difficult, if not impossible, to say how much there was of mendacity,—how much of simple incorrectness, the honest work of the imagination. That mendacity was not wholly without its share, can scarcely admit of doubt. True miracles are not wanting (says a man to himself on this occasion), true miracles have not at least been wanting, on this our side, the side of sacred truth. But unhappily the true are not quite sufficient; sufficient for other times, but unhappily not for the present incredulous age, in which, somehow or other, the source of miraculous evidence appears to have run itself dry.' Profiting by the occasion, let us do what

first is incapable of deducing regular conclusions from having been once deceived, and the two last not likely to come a second time in your way), is sufficiently compensated by the immediate benefit which you propose by the falsehood."—  
MORAL-AND POLITICAL PHILOSOPHY, Book III, chapter  
15.—Editor.

depends upon us towards supplying the deficiency. Truth must indeed be departed from: but the end will sanctify the means. What end can ever approach to it in importance? and falsehood, the instrument we mean thus to sanctify, as Pagan temples have been sanctified by being converted into churches, how often has it not been applied to the most flagitious, the most impious ends!

Of all the religious codes known, the Hindoo is the only one by which, in the very text of it, if correctly reported, a license is in any instance expressly given to false testimony, delivered on a judicial occasion, or for a judicial purpose: and in this instance, among the cases pitched upon for receiving the benefit of the license, are some, which, viewed through an European medium, will be apt to appear whimsical enough.

Cases, some extra-judicial, some judicial, and upon the whole in considerable variety and to no inconsiderable extent, are specified, in which falsehood, false witness, false testimony, are expressly declared to be allowable.

1. False testimony of an exculpative tendency, in behalf of a person accused of any offence punishable with death. Three cases, however, are excepted: viz. 1. Where the offence consists in the murder of a Bramin; or 2. (what comes to the same thing), a cow; or 3. In the drinking of wine, the offender being, in this latter case, of the Bramin caste.\*

\* Halbed's Code of Gentoo Laws, printed by the East India Company, anno 1776, p. 129, 4to. chapter 3, section 9.

" Whenever a true evidence would deprive a man of his life, in that case, if a false testimony would be the preservation of his life, it is allowable to give such false testimony ; and for ablution of the guilt of false witness, he shall perform the *Poojeeh Sereshtee* ; but to him, who has murdered a *Bramin*, or slain a cow, or who, being of the *Bramin* tribe, has drunken wine, or has committed any of these particularly flagrant offences, it is not allowed to give false witness in preservation of his life."

In the representation of the other cases, scarce a word could be varied, without danger of misrepresentation : word for word they stand as follows :—

" If a marriage for any person may be obtained by false witness, such falsehood may be told ; as upon the day of celebrating the marriage, if on that day the marriage is liable to be incomplete, for want of giving certain articles, at that time, if three or four falsehoods be asserted, it does not signify ; or if, on the day of marriage, a man promises to give his daughter many ornaments, and is not able to give them, such falsehoods as these, if told to promote a marriage, are allowable.

" If a man, by the impulse of lust, tells lies to a woman, or if his own life would otherwise be lost, or all the goods of his house spoiled, or if it is for the benefit of a *Bramin*, in such affairs, falsehood is allowable."

To the religious sanction,—consideration being had of the undoubted magnitude of its influence on some occasions,—on an occasion of this importance and extent, a place cannot be altogether refused. Yet, if,—in preference to theories,

however generally received, and rendered plausible by the collateral experience just mentioned —experience in the exact direction of the case here in question, and that no less unquestionable than the other, be admitted as the test; the more closely it is scrutinized into, the less efficient in the character of a security for the truth of testimony in all ways taken together, or even in the character of a security against wilful and self-conscious mendacity, will it be found.

To judge of the real and proper force of any power, try it, measure it, not when acting in combination with other forces, but when acting alone. If, as applied to forces of the physical class, the propriety of this rule be clear beyond dispute, it will scarcely be less so when applied to any force of the psychological class.

That, when the force of the religious sanction is accompanied and conjoined with the two human forces, the force of the moral and legal sanctions, or even with either of them alone, the force of these powers united is in a high degree efficient,—so much so, as to throw into the state of exceptions taken out of a general rule, the cases of its failure,—is out of dispute. But take a case, take any case, in which it may be seen to come into the field alone, and without support from either of those indisputably powerful coadjutors; the scene will be found to experience a total change.

If there be a mode of conduct which, being clearly and universally understood to stand prohibited by the force of the sanction in question, (viz. the religious) is, nevertheless, generally, and as far as can be seen, universally, or almost universally, practised; so far as concerns the

prevention of *that* mode of conduct at least, the body of force in question, however composed, cannot but be acknowledged to be in a correspondent degree inefficient. If, in the formation of that body of force, the force of all these sanctions were comprised, the degree of inefficiency thus demonstrated would extend to all three : if the force of one of the three, and that one only,—it is to that one that the demonstration of inefficiency will stand confined.

If, the mode or species of conduct in question being mendacity, wilful and self-conscious falsehood,—the utterance of that falsehood be accompanied by a more than ordinary and most ample degree of deliberation ; the demonstration of the inefficiency of the sanction in question will be the more conclusive.

If either the practice of this wilful falsehood, or what to this purpose comes to the same thing, the approbation—approbation avowedly and publicly bestowed upon it,—be the practice, not of men taken promiscuously from the herd, but of men carefully and anxiously selected for the occasion, under the persuasion of their being in a more than ordinary, in even the highest, degree, sensible to the influence of this sanction ; the proof of the inefficiency of this sanction will be seen to possess from these circumstances a still higher force.

The examples in which this proof of the inefficiency of the religious sanction in respect of the prevention of wilful and deliberate falsehood stands exhibited, may be comprised under the following heads :

1. Cases in which, under the influence of a manifestly-operating sinister interest in the

shape of wealth, power, dignity, or reputation, such declarations of opinion are made, as, from the nature of the facts asserted, cannot, consistently with the nature of the human mind, be in all points true; but without any particular proof of falsity operating in the case of one such false declarer more than another. To this head may be referred all solemn declarations of opinion on the subject of controverted points respecting facts out of the reach of human knowledge, delivered in the shape of pre-appointed formularies; adopted and authenticated by the signature of the witness in question, or otherwise; the declaration enforced or not by the ceremony of an oath.\*

2. Cases where,—under the influence of a mendacity-exciting interest constituted by the fear of present and unavoidable corporeal sufferance terminating in extinction of life,—declarations of opinion respecting individual facts or supposed facts actually in dispute, are delivered by a numerous company (twelve, for instance), the members of which are forcibly kept in that state of affliction, until, and to the end that, they may, in conjunction, declare themselves to be all of one opinion, whether they really be so or no: in circumstances in which, in relation to these same points, immediately before such conjunction, different opinions, in all num-

\* Every person taking orders in the English church, signs a declaration of his full belief in the whole of the thirty-nine articles of that church. Some of the most pious members of it have not, however, scrupled to declare, that it is not necessary that this declaration should be true: that it is allowable for a person who does not believe in the whole, but only in a part, of the thirty-nine articles, to sign a declaration professing himself to believe in the whole.—*Editor.*

bers less than that of the whole company, have been declared.

To this head belongs the pretendedly unanimous opinions delivered under the name of *verdicts* by companies of occasional judges assembled together under the collective name of a *jury*, in the judicial practice of English law, under the technical system of procedure.

3. Cases where,—under the influence of mendacity-exciting interest constituted by so weak a force as that of sympathy for the sufferance of a stranger,—declarations of opinion are delivered with one voice by an equally numerous company, in circumstances in which it is morally impossible that such declarations should be other than wilfully false in the instance of any one of the members. To this head belong the innumerable instances upon record, in which juries, to shield criminals from the unduly-severe punishments prescribed by a bad law, have solemnly and on their oaths declared, that articles of property, which they knew to be of the value of five, ten, or twenty pounds, were under the value of forty shillings.

4. After the above, it is a sort of anticlimax to bring to notice, in this point of view, the course of practice under the technical system of procedure; under which, in the instance of every individual suit without exception, judges, judicial officers their subordinates, professional lawyers of all descriptions, and suitors, unite in the utterance of an indefinitely extensive congeries of wilful falsehoods. Judges, with their subordinates and brethren of the profession, voluntarily, under the influence of the profit derived from these enormities; suitors, under the influ-

ence of the rewards and punishments, by means of which they are in some instances encouraged, in others compelled, by the judges, to join in the habitual perpetration of the same or the like enormities, according to the nature of the instruments and operations into which the tincture of falsehood is infused.

On this occasion, two descriptions of persons, standing in so many different situations, require to be distinguished :—1. the individuals who, clothed or not with any authority, engage in the practice of wilful falsehood—the practice thus undeniably reprobated by the religious sanction ;—engage in it not of their own motion, but either excited by the reward, or compelled by the punishment, held up to them by their superiors : in this situation stand all the members of the community (except in so far as the people called Quakers form an exception), as well as a select portion of them in the character of jurors ; and 2. those their superiors, under whose constantly-observing eyes, and never-withhelden approbation, this irreligious practice is carried on, and, in an immensely extensive mass of instances, cherished and enforced by the united powers of reward and punishment.

In this situation may be seen bishops and judges : bishops, to whom, under the notion of their being endued with a more than ordinary degree of sensibility to the action of the motives belonging to the religious sanction, and of their devoting their time to the endeavour of screwing up to its *maximum* that sensibility in the minds of the rest of the community, such enormous masses of emolument, power, and dignity, are attached : judges, to whose situations, masses

of emolument in some instances still more ample, together with masses of power in every instance much more ample, are, if not under an equally strong persuasion, at least under a like notion, also attached.

5. A still more striking instance of the inefficacy of the religious sanction, when unsupported by the other sanctions, to the production of truth, is that of University oaths. Every student who enters the University of Oxford, swears to observe certain statutes, framed long ago by archbishop Laud for the government of the University. From the frivolity and uselessness of the observances which these statutes prescribe, public opinion does not enforce an adherence to them. The moral and the legal sanction stand neuter: the religious sanction, however, remains, and that in its most powerful shape, the shape which is given to it by the ceremony of an oath. This then is an *experimen-tum crucis* on the force of the religious sanction. If it be notorious that there is not a single student who does not openly and undisguisedly violate those very statutes, which he has solemnly invoked eternal vengeance upon his head if he does not rigidly observe,—violate them, and that as often as the minutest conceivable inconvenience would be incurred by adherence to his oath,—then, surely, the weakness of the religious sanction, considered as a security for veracity, to say nothing of any other virtue, is demonstrated. But every person who has been at the University of Oxford, can testify that this description is literally true.

The weakness manifested in all these instances by the religious sanction, is among those

facts which, how little soever adverted to, are most notorious and undeniable. In all these instances, falsehood is committed by high and low, without concealment, scruple, or reluctance. Why? Because it is by the force of this sanction alone that the practice stands prohibited: a sanction composed of pains and pleasures removed to an indefinite distance in point of time, and none of which have ever been presented by experience to any human being.

In other instances, and to a still greater extent, the practice of falsehood is in a very considerable degree repressed, and, in so far as committed, not committed without great reserve, and the most anxious exertions made to conceal it from every eye. Why? Because it is by the force either of the political sanction, or the moral sanction, or both together, that the practice stands prohibited;—of one or both; but, to the production of those symptoms, the force of either is of itself sufficient.

In the case of an interest, by the action of which, violent passion is liable to be produced; desire of great pecuniary gain, for instance, fear of great pecuniary loss, sexual desire, or fear of immediate death or severe bodily affliction; in the case of a contest between the hopes and fears belonging to the religious sanction on the one hand, and any such powerfully-acting motive or interest on the other, and the occasional triumph of the more immediate over the more remote, and, as it will be apt to appear, less certain, interest; the inference afforded of the weakness of the religious principle, by the event of such a contest, would not be so conclusive. The power of the religious principle is in gene-

ral strong (it might be said) and in a great degree efficient; but (owing to the frail and variable texture of the human mind) not so strong as not to be liable to be, in here and there an instance, borne down by the violence of these stormy passions.

But among the above examples we see one, in which the power of the religious principle is brought into the field in the utmost force of which it is susceptible, and still, habitually, and as it were of course, gives way to an interest of the very weakest species, viz. sympathy for the suffering of a single individual: an individual who is a perfect stranger to all the members of the judicatory, by which the contempt of religious principle is thus manifested; and he a criminal, in whose instance, in the judgment of the supreme and competent authority of the state, the suffering from which by this act of mendacity it rescues him, ought to have been inflicted.

In another of the above examples, that of university oaths, the whole force of the religious sanction, exerted in the strongest and most binding of all its shapes, fails of producing any, even the slightest, effect. Is it that it has some violent, some uncontrollable, passion to contend with, such as it might fail of overcoming, without affording any strong inference against its general efficacy? No: but, by fulfilling an obligation, contracted under the sanction of so solemn an engagement, some slight inconvenience, some little trouble, might, in some instances, be incurred. The minutest possible quantity of trouble, being thrown into the scale against the obligations of religion, is found, not

in the case of an insulated individual, but of every Oxford student without exception, sufficient to outweigh them.

In the case of that pretended unanimity, which has so wantonly and unnecessarily been rendered compulsory on the occasions of the decisions pronounced by juries,—the religious principle, it is true, finds itself encountered by the force of one of those almost irresistible motives above mentioned, viz. desire of self-preservation from death, aggravated by long protracted torture: at the command of him who has the strongest stomach among you, yield, some or all of you, to the number of from one to eleven out of twelve—yield, and perjure yourselves. Immediately after the oath, by which you have engaged to your God not to join in any verdict but the one which, in your judgment, is true, join notwithstanding in a verdict which, in your judgment, is not true:—do thus, or inevitable death, preceded by insupportable torture, is your doom. Thus saith the law,—that is,—thus, in one knows not what age of barbarity and ignorance, have said those unknown judges, by whose authority this combination of torture with perjury was forced into judicial practice. Here, it must be confessed, the force of the physical sanction, with which that of the religious sanction has to contend, is no light matter:—the choice is between perjury and martyrdom.

But though, in the instance of the individuals themselves, on whom, in the character of occasional judges or jurymen, this obligation of trampling upon religious principle is imposed, the force by which it is subdued is thus mighty

and irresistible; no such force does that principle find to contend with, in the instance of those exalted functionaries, by whose hands the anti-religious obligation is, with such undisturbed serenity and undissembled complacency, habitually imposed. Until the perjury shall have been committed, and to the end that it may be committed, the judge holds himself prepared to torture the jurymen: but by no torture is the judge compelled or excited to manifest the satisfaction so habitually and cordially manifested by him at the thoughts of the practice in which he bears so capital a part, a practice which has torture for its means and perjury for its end.

How unpleasant soever, this comparative estimate was with a view to practice altogether indispensable. To depend, on every the most important occasion of life, upon the force of a principle which, on the occasions here in question, not to speak of other occasions, has been demonstrated by experience to be nearly, if not altogether, without force, would continue to lead, as it has led, to mischievous error and deception, to an indefinite extent. The topic of *oaths*, and the topic of exclusionary rules, grounded on the supposition of a deficiency of sensibility to the force of the religious sanction, will furnish proofs and illustrations.\*

\* See Book II. SECURITIES, Chapter 6, and Book IX. EXCLUSION, Part III. Chapter 5.

Cases no doubt there are, and those very numerous, in which the religious sanction appears to exercise a much stronger influence than is here ascribed to it. That which is really the effect of the moral sanction, or of the legal sanction, or of both, is continually ascribed to the influence of

The opinion above expressed is not new. Divines of the most undisputed piety have repeatedly given their sanction to it.

The inefficacy of preaching (*l'Inefficacité de la Prédication*), constitutes the title, as well as the subject, of a work, published about the middle of the last century, by the abbé Coyer, a French divine of the Romish church. To prove, or endeavour to prove, the inefficacy of preaching, is in other words to prove, or endeavour to prove, the weakness of the religious sanction; after, and notwithstanding, all the force that could in that church be given to it by the most richly-rewarded eloquence.

The same proposition is (if auditors are to be believed) among the propositions habitually brought to view, as being habitually either maintained or assumed, and too manifest to be denied or doubted of,—brought to view in his sermons by a clergyman of the church of England, distinguished, even among those of the Methodist persuasion, for the union of zeal and eloquence.

the religious sanction. From causes which it would be easy, but foreign to the present purpose, to explain, religious persons are apt to suppose, that an act, if virtuous, is more virtuous, if vicious, more excusable, when the motive which prompted it belonged to the religious class, than when it belonged to any other: and even in some cases, that an act which, if produced by any other motive, would be vicious, becomes virtuous by having a motive of this class for its cause. Thus it becomes the interest of every one, to whom the reputation of virtue is an object of desire, to persuade others, and even himself, that as many as possible of his actions, be they good or bad, emanate from that class of motives.—*Editor.*

The occasions on which, in both these instances, the weakness of the religious sanction stands confessed, or rather maintained and advocated, is that of its application to the purpose of meliorating the moral conduct of mankind: viz. in the dealings between man and man, and the conduct of man in regard to his own happiness, in the trifling business of the present transitory life.

To have endeavoured to disprove its efficacy in all respects, would have been an endeavour as vain as it is unexampled.

Various are the purposes to which its efficacy, in a greater or less degree, seems out of the reach of dispute.

1. In causing men to try to believe—to succeed in a considerable degree in their endeavours to believe—and whether they succeed or no, to say they believe,—improbable, and even impossible things: and with the more energy, the greater the improbability: and with most energy of all, those things which, not being facts either true or false, but contradictions in terms, are of all things most palpably and flatly impossible.

2. To cause men to profess to regard, and really to regard, with hatred and contempt, and to treat with unkindness, and, when power and opportunity occur, with oppression, those whose belief is not, or is suspected of not being, directed to the same objects, or not with the same energy, as their own belief.

3. To cause men to regard with fear, and in many instances with fear worked up to the pitch of insanity, and to profess and endeavour

to regard with love, a being, to whom none of those sentiments can be of any use.\*

\* If this view of the matter be just, two practical consequences seem to follow.

1. That it is a misapplication, a degradation, a profanation, to endeavour to apply so sublime an instrument to so mean a cause. It is applying pearls to the fattening of swine: the pearls are thrown away, and the swine not fattened.

2. That the instrument, not being applicable by government with advantage to any good purpose of government, the best course that can be taken in relation to it is the course so generally taken in relation to it in the United States, viz. to leave the application and enforcement of it to the sincere and unbought exertions of individuals.

## CHAPTER XII.

**GROUND OF PERSUASION IN THE CASE OF  
THE JUDGE—CAN DECISION ON HIS OWN  
KNOWLEDGE, WITHOUT EVIDENCE FROM  
EXTERNAL SOURCES, BE WELL GROUNDED?**

A DECISION pronounced by a judge on a question of fact, what efficient cause can it have had, so it be conformable to justice, other than evidence? None whatever, is the answer that naturally presents itself.

To this rule, however, four cases may on further reflection be apt to present themselves in the character of exceptions: four cases, of the first of which it will be seen that its title to that character will, on examination, be affirmed; while in the three others it will be disallowed.

Case 1.—The only perceptions on which the decision concerning the fact is grounded, are perceptions obtained by the judge himself, without any report made to him by any other person, in the character of a percipient witness. In this case, the functions and characters of percipient witness and judge are united in the same person: deposing witness there is none,

there not being either need or room for the appearance of any person in that character.\*

Case 2.—No person appears on either side in the character of a deposing witness: but the facts on which the decision is grounded, are, for the purpose of the decision, established, by the admission, express or implied, of the parties on both sides.†

Case 3.—The facts in question are deemed too *notorious*, to stand in need of being established by special evidence.

Case 4.—Facts on one side having been deposed to, and in such manner, that, supposing the deposition credited, they would have been established by evidence; a decision in disaffirmance of those facts is formed, on the mere ground of *improbability*.

Of these four cases, the first mentioned alone, viz. decision on *view*, will be found, as already observed, a real exception to the rule. It is a decision without evidence.

\* Under English law, this state of things is exemplified in the case in which the judge has been authorised to convict on “*view*:” to pronounce a man guilty of having committed an offence of this or that description, on the ground that the act of transgression was committed under the observation of the judge himself.

† Under English law, on admission express on both sides, as when a case is stated by them in conjunction, for the opinion of the court: on admission presumed, on howsoever slight a foundation, by the judge, from the deportment of the defendant, in the case when he omits to perform this or that operation, the performance of which is exacted of him on pain of his being considered as having admitted the facts necessary to establish the demand on the plaintiff’s side: as in the case of judgment for default, *Bill taken pro confesso, &c.*

Without evidence? The judge, in this case, has he not the evidence of his own senses?—Doubtless: but, in this case, the expression is but figurative: nor does the word *evidence* designate the same idea in this, as in other cases: his senses are detached from his person, erected into so many independent persons, and in that character introduced as witnesses. To keep clear of this confusion; instead of decision without evidence, say rather, decision without *testimony*: not that the confusion will, even in this case, be entirely avoided.

Without evidence? be it so then. But the ground of the decision, is it not still firmer than if it were composed of evidence? Yes, certainly: if the only mind, the satisfaction of which were worth providing for, were that of the judge, by whom, in the first instance, the decision were to be pronounced. Supposing his opportunities of observation sufficient, and those opportunities improved—a report, however trustworthy, made of the fact by any other person concerning the supposed perceptions of that other person, will be but a very inadequate succedaneum to any perceptions obtained by himself. Whatever be the superiority which immediate possesses over hearsay testimony, the same will internal perception on the part of the judge possess, in comparison with persuasion grounded on the testimony of another, or any number of others.

If, then, the mind of the judge were the only mind, the satisfaction of which were worth regarding; perception obtained by the judge would be a ground of decision, not merely equal, but far superior, to evidence. But unless

absolute despotism, seated in the breast of the judge himself, be the only eligible form of government, the mind of the judge is not the only mind the satisfaction of which is worthy of regard. So far from it, that it is only in the character of an instrument of satisfaction to some other mind or minds, that satisfaction afforded to the mind of the judge himself is of any use. In the case of unbridled despotism seated in some one superior breast, as in Morocco, it is of the mind of the despot, and of him alone: in the case of any government simply monarchical, or, in a greater or less degree, popular, in which the affections of the public are, or are professed to be, an object of regard, it is the mind of the public, the satisfaction of which must (if propriety or consistency be regarded) be said to be the ultimate object in view.

Of this theoretical disquisition, what then is the practical use? To ascertain whether under any, and, if under any, under what conditions, power should, in any case, be allowed to the judge for deciding on the ground of his own perceptions, without the support of personal evidence *ab extra*.

The answer seems to present little difficulty. In the first instance, and for saving delay, vexation, and expense, as well as to prevent misdecision, or non-decision for want of demand, let the judge's own perception be a sufficient ground for decision—for a decision to be pronounced by himself.

In case of *appeal*, which, in a case of this sort, ought ever to be allowed; to guard against ultimate misdecision, let it be incumbent on

the judge, if so required, to officiate in the character of a deposing witness, and in that character state the facts, subject to counter-interrogation,\* exactly in the same manner as any other witness.

Even in the first instance, if the judicatory be, as it ought if possible to be, so constructed as to admit and contain an audience; in pronouncing his decision, the judge might and ought to deliver, in his character of percipient witness, in the face of that audience, the facts which that decision takes for its ground.

Many, as will be seen, are the cases in which, to help form the ground for decision, cognizance of this or that matter of fact is, under every system of law, obtained, in the way of immediate perception, by men occupied in the exercise of judicial functions: but, in these cases, perception constituting but a part of the ground of decision, and forming no more than a sort of supplement to testimony, they come not under the head of decision without evidence.

We come now to the cases in which the absence of evidence is but apparent, or regards no more than a part of the aggregate mass of legally operative facts.

1. First comes the case of admissions, as above explained—express, or implied.

Admissions are but evidence, are but testimony, under another name.

When the admission is express, being the declaration of a party, and the effect of it ope-

\* See Book II. SECURITIES. Chap. 9. Interrogation.

rating, so far as it goes, in disfavour of him whose declaration it is, it comes under the head of self-disserving evidence.

Evidence of this description is, it will be seen, not only evidence, but the most trustworthy of all evidence: understand always, so far as the application made of it—i.e. the decision grounded on it—is confined to the interest of him whose declaration it is, and such other interests, (viz. the interests of his representatives), as, being placed at his disposal, are considered as included under his.

When the admission is, as above explained, not express but only implied, the evidence is not direct but circumstantial: evidentiary fact, the negative act, the species of *default* above exemplified; principal fact, or fact evidenced, admission of the fact by which the interest, which the admitting party has in the cause, is disserved.

2. Next comes the case where the fact is of the number of those which, being considered as placed by *notoriety* out of the reach of dispute, have therefore no need of being established by *special* evidence,—by evidence adduced for the single purpose of the suit actually in hand.

If, to the purpose in question (viz. the purpose of serving, or helping to serve, as a ground for judicial decision) the fact be really notorious, it is notorious to the judge: a persuasion of the existence of it,—a persuasion, strong enough to give support to decision,—is already formed in the bosom of the judge: this being assumed, all special evidence, all evidence the object of which is to endeavour to form such a persuasion, is, by the supposition, so far as *his*

persuasion alone is deemed sufficient, superfluous and useless.

But, unfortunately, between facts that to the purpose in question are sufficiently notorious, and those that are not so, no distinct line is to be found: and where, in regard to this or that fact, a general persuasion of its existence is sufficiently prevalent, and to a sufficient extent, yet, in regard to this or that material circumstance, the persuasion is not perhaps sufficiently extensive and distinct. A fact, regarded as notorious by one man, may be matter of dispute to another: a fact, regarded as notorious by the plaintiff, may be matter of dispute to the defendant, and even to the judge.

From this indeterminateness, the practical inference seems to be as follows:—To save delay, vexation, and expense, it ought always to be in the power of the judge, at the instance of either party, to pronounce, and, in the formation of the ground of decision, assume, any alleged matter of fact as notorious. On the other hand, to guard against misdecision, it ought at the same time to be allowed to the party,—viz. to the party to whose prejudice the fact, if assumed would operate—to deny the notoriety of the fact, and, in so doing, call for special proof to be made of it: provided always, that, for a false assertion to this effect, as for a false declaration of his persuasion to any other effect, he should stand exposed to suffer,—whether by burthen of punishment, or by burthen of satisfaction, or both,—as for wilful, *i. e.*, self-conscious, falsehood, or falsehood through temerity, as the case may be.

When a fact is really to such a degree no-

rious, as that a man will not, without the imputation of falsehood, be heard to deny his persuasion of its existence, or to speak of himself as doubting of it,—in such case, if, in addition to a simple call for proof of it, an express declaration of such disbelief or doubt be made requisite to the existence of the obligation of complying with such call, shame, fear of disrepute, will in general be sufficient to prevent any such call from being made, in a case in which the declaration, if made, would be otherwise than sincere: but, if no such declaration be required—if the obligation follow upon the call—such call ought to be expected, as a matter of course, in every case in which, by a chance of misdecision in favour of him who makes the call, or by delay, vexation, or expense, created by it, to the prejudice of the other side, a sinister advantage may, in any shape, be reaped from it.

Under the existing systems of technical procedure, spun out everywhere under the impulse of an interest directly opposite to every end of justice; the object, so far as concerns evidence, has everywhere been, not to lighten, but to aggravate, the load of unnecessary evidence: accordingly, proof made by one party of facts of which on the other side there is no doubt, proofs, in a word, substituted to admissions, are among the resources drawn upon for the advantage of the actual and mischievous ends of judicature: and as to this, so to other purposes, to prevent those explanations by which injustice, in all its shapes, would be prevented, is among the objects which have been but too effectually accomplished.

It will seldom, if ever, happen, that, for the substantiating either the plaintiff's demand, or the defendant's defence, no other facts than such as are already notorious will require to be believed: it is seldom therefore, if ever, that evidence, special evidence (admissions as above included) will altogether be to be dispensed with.

3. Lastly, comes the case in which, in disaffirmance of facts affirmed by evidence on one side, a decision is pronounced on the ground of the improbability of these same facts.

Though not pronounced altogether without evidence, a decision thus grounded might seem to be pronounced without evidence adduced on the side in favour of which it is pronounced.

But, upon examination, it will be found that even in this case the decision is not without support from evidence. The evidence belongs, indeed to that class which has received the name of circumstantial evidence; a modification of circumstantial evidence, composed of all those facts, all those sufficiently notorious facts, the existence of which is regarded as incompatible with the existence of the facts to which it is thus opposed; or, at any rate, as affording inferences of their non-existence;—inferences strong enough to be regarded as conclusive, and, in that character, to govern and determine the persuasion of the judge.\*

\* The subject of improbability will be treated at considerable length in the Book on Circumstantial Evidence, (Book V.)

## **BOOK II.**

### **ON THE SECURITIES FOR THE TRUSTWORTHINESS OF TESTIMONY.**

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#### **CHAPTER I.**

##### **OBJECT OF THE PRESENT BOOK.**

**I**N the preceding book, a survey has been taken,—on the one hand, of the standing causes, the psychological causes, of trustworthiness in human testimony,—on the other hand, of the occasional causes of untrustworthiness ; including the incitements to mendacity, the seducing motives, the sinister interests, by which the tutelary influence of the causes of veracity is liable to be counteracted and overborne.

In the planning of the system of judicial procedure, with a view to the main end of procedure, viz. the rendering of decisions conformable on all occasions to the predictions pronounced by the substantive branch of the law ; the object of the legislator will be to strengthen, as much as possible, the influence of the causes of trustworthiness ; to weaken, as much as possible, the influence of the causes of untrustworthiness—the sinister interests of all kinds ; that

is to say, interests, motives, of all kinds, as often as it may happen to them to be acting in this sinister line.

To exhibit a view, as complete as may be, of the several arrangements of procedure, capable of being made to operate in the character of securities for trustworthiness in testimony, and thence as securities against deception from that quarter, and consequent misdecision on the part of the judge, is the business of the present book: to shew, in the first place what may be done, and ought to be done, to this end; in the next place, what, in the Roman and English modifications of the technical system, has been done on this subject, in pursuit of whatsoever ends the authors have on such occasions set before them.

A mass of evidence, consisting of human testimony, brought into existence for the occasion and on the occasion, (without any mixture of *real* evidence, pre-appointed written evidence, or other written evidence antecedently brought into existence by other causes) a mass of evidence of this description is about to be presented to the cognizance, and to serve as a basis for the decision, of the judge. By what means, within the power of the legislator, shall its trustworthiness be raised to a maximum? By what means shall the danger of deception on the part of the judge, and, from that or other causes, of misdecision on the ground of the evidence, be reduced to its minimum? To find an answer to these questions is the problem, the solution of which will be the object of the present book.

The mass which is the subject of our pro-

blem, is the whole mass, and every mass, to which it may happen on any occasion to be taken into consideration, for the purpose of forming, by means of it, a ground for a judicial decision. It must therefore be considered in respect of every modification, of which, in judicial practice, a mass of this description is susceptible. It may be simple to the utmost degree of simplicity; complex, to any degree of complexity. It may consist of the testimony of no more than a single person, and consequently on one side only, the plaintiff's side; it may consist of the testimony of any number of persons, and that either on the plaintiff's side, or on the defendant's as well as the plaintiff's; each side being again to this effect divisible into as many sides, as there are parties ranged on it, with different, and actually or possibly conflicting, interests. It may consist of the testimony of an extraneous witness or witnesses only, or of a party or parties only, or of a mixture of testimonies of both descriptions. For all these diversifications, provision must be made in the system of arrangements destined to serve as securities for trustworthiness in testimony.

## CHAPTER II.

### DANGERS TO BE GUARDED AGAINST, IN REGARD TO TESTIMONY, BY THE ARRANGEMENTS SUG- GESTED IN THIS BOOK.

THE proper object of the judge, according to the most general description that can be given of it, is, on every occasion to pronounce such a decision as shall be called for by the law, on the ground of the facts of the case: and, for that purpose, to form, in relation to each material fact, by means of a statement afforded by human testimony or otherwise, a conception exactly conformable to the truth; so far at least as is material to the decision which he is called upon to pronounce.

In this endeavour he will be liable to be defeated by any of the following results.

1. If in relation to any such material fact the testimony be, in any point, incorrect; although such incorrectness be unaccompanied with that self-consciousness which mendacity implies.
2. If in relation to any such fact it be incorrect in the way of mendacity, as above.
3. If the collection of the facts, thus presented to his conception, be in any respect in-

complete.\* By such incompleteness the rendering of the decision duly adapted to the case may be as effectually prevented as by incorrectness or mendacity itself. To warrant a decision (say on the plaintiff's side) let proof of certain facts, in a certain number (say four), be

\* Regarded in a certain point of view, the two imperfections—falsehood (including incorrectness and mendacity) falsehood and incompleteness, may appear to coincide. Previous to the exhibition of the testimony, an oath, suppose, is exacted from the deponent—an oath promising completeness. Such oath having been taken, if the deposition be in any respect incomplete, it is in so far false.

*Answer.*—Say rather perjurious than false. An oath is violated, but the oath thus violated is, in this respect, not an assertory oath, but a promissory one. A promise is broken, but no falsehood uttered.

*Reply.*—But suppose a general assertion made at the conclusion of the deposition. *What I have deposed contains everything material that fell under my observation—at any rate everything material that I recollect.* Or, instead of an oath in the promissory form, (as it most commonly is, when the form in which it is exhibited is oral deposition) suppose it not promissory but assertory; as it most commonly is when the form is that of a deposition already written.

Here, at any rate, the distinction vanishes; in so far as the deposition is incomplete, just so far it is false.

*Rejoinder.*—Incomplete, and therefore false—admitted. But the proposition in which the falsehood resides is altogether different in this case from what it is in those. In this case, the false fact is but one, and that one, whatever be the matter in dispute, always the same; viz. the completeness of the narration that has just been exhibited. Whereas, if the narration, so far as it goes, contains false facts, false assertions, of any other kind, every one is distinct from every other—every one of a complexion peculiar to the individual cause.

The difference which exists between falsehood consisting in a false assertion of completeness, and falsehood at large, is not the only reason, nor the chief reason, for expressing the two modes of imperfection by different appellations. They constitute two different objections against the trustworthiness of evidence: objections, of which the one may exist without the other.

necessary. If three of these only be proved (say each of them by two witnesses, the testimony of each witness being correct in the extreme) and not the fourth, the plaintiff will be as effectually debarred of his right, as if there had not been a single particle of truth in the testimony of so much as one of their number.

Incorrectness, mendacity, and incompleteness—such are the imperfections from which it will be the object of the legislator to preserve, on each occasion, the evidence that, in the shape of human testimony, comes to be presented to the judge.

The idea of incorrectness being included in that of mendacity, the mention of the word incorrectness may be apt to appear superfluous.

The distinction will, however, be found to be highly material, and that to more purposes than one.

1. In the first place, as will be seen, the list of securities is not the same in the two cases. Suppose *bona fides*, for example; prompting, suggestive indication and interrogation, would in many cases be highly conducive to the correct and complete disclosure of the truth in the case; highly useful against false asseveration, false negation, and, in particular, false omission; and, comparatively speaking, free from danger: suppose *mala fides*, the same sort of assistance may be to be guarded against with the legislator's utmost anxiety and diligence.

2. The other purpose regards punishment. Unaccompanied with temerity, simple incorrectness presents, it is obvious, not the least demand for punishment: accompanied with temerity, it may present a demand for punishment, viz. in some comparatively inferior degrees.

gree, not rising above that which is insuperably attached to the burthen of rendering pecuniary satisfaction in case of injury: accompanied with *mala fides*, it rises into that serious crime, which, by a very intimate, though, as will be seen, a very unfortunate, association, has, in the cases where punishment has been attached to it, been designated by the name of perjury.

So far as the failure is accompanied with *bona fides*, the legislator finds, by the supposition, no *will* acting in opposition to him; he has scarce any difficulty to contend with; the demand for securities is inconsiderable. When, on the contrary, the transgression is accompanied by, and originates in, *mala fides*, it originates in design, in fraud; he finds human *will*, perverse *will*, acting against him with all its might; and all the securities he can muster, with all the force it is in his power to give to them, prove but too often inadequate to his purpose.

Were it possible for the legislator, viewing each transaction from his distant station, to draw a line in each instance between the two cases, and say to himself, this man is in *mala fides*, but this other in *bona fides*; his task would still be comparatively an easy one. Unfortunately, from the distant station he occupies, no such determinate line can be drawn: of one sort of man, he may say he is most likely to be in *mala fides*, as in the case of an accomplice; of another sort, he is most likely to be in *bona fides*, as in the case of *official evidence*:\* but, with sufficient grounds of assur-

\* See Book IV. PRE-APPOINTED, Chapter 8. *Official Evidence.*

ance, he can never ground his arrangements exclusively either on the one supposition or on the other, in any instance. A determination of this kind must either be abandoned altogether, or (under favour of the appropriate information, extractible from each individual case) entrusted to the probity and prudence of the judge.

There being no individual whatever, of whom the legislator, in his position, can be warranted in regarding himself as completely sure that his testimony will be altogether pure from *mala fides*; there is no individual soever, for whose case he can avoid providing,—to be applied eventually at least, and sooner or later,—whatever securities it is in his power to supply, for the purpose of combating those sinister motives, to the action of which human testimony can never cease to be exposed.

To the three imperfections above enumerated, must be added, for practical reasons that will be presently seen, that of *indistinctness*; an imperfection which, though not exactly synonymous either with incorrectness or incompleteness, may, according to circumstances, have the effect of either. In truth, one of the two effects it *must* be attended with, to be capable of giving birth to deception, and thence to misdecision: if it be not productive of this bad effect, the only remaining bad effects of which it is capable of being productive, (and of those it is but too apt to be productive), are reducible to the heads of vexation, expence, and delay.

To the consideration of the dangers to be guarded against by the securities in question, must be added that of the *stations* to be guarded against those dangers: these are, all of them, re-

ducible to two ; that of the deponent, and that of the judge.

Under the designation of deponent must here be comprised, not only extraneous witnesses, but each and every party in the cause ; where it happens to him, whether at his own instance or that of an adversary, to deliver his testimony in the cause.\*

\* Witness (to speak here of depositing witness) is an appellation that with propriety may be, and sometimes at least of necessity must be, applied to the designation of every person whose discourse, when exhibited to a court of justice, is employed in the character of *testimony*, or say *evidence*. If this be true, it must be applied, every now and then, to those who are *parties* in the cause, as well as to persons, who, not being parties, are more commonly meant when the word *witness* is employed.

At any rate, it must surely appear strikingly inconsistent and incongruous,—after speaking of a person as one who has been depositing, giving testimony, whose testimony, or deposition, or examination, has been given in,—to deny that he has acted in the character of a deponent, an examinee, or a witness.

Yet, somehow, (such is the perversity and inconsistency of language), a notion seems generally to have obtained, of a sort of incompatibility, (whether natural or factitious, seems not to have been distinguished), between the character of a party and the character of a witness : insomuch that, when Titius or Sempronius is spoken of as being a party in the cause, we conceive of him as of course, as not having acted, nor being about to act, in the character of a witness : and *e converso*, if he is spoken of in the character of a witness in the cause, we conceive of him, as of course, as not bearing any such relation as that of party to the cause.

This conception, partial and erroneous as it is, is receiving continual support from one of those maxims of technical jurisprudence, which, familiar as they are, are yet, in every imaginable sense, false. *Nemo* (to take it in the language in which it probably originated)—*nemo debet esse testis in propriâ causâ*. That it ought not, in any case, to be considered as founded in utility, reason, and justice, is an opinion which will be receiving continual support in the progress of this work. That, in point of fact, in the practice of

The quarter from which the imperfections above mentioned are most to be apprehended, is evidently that of the witness. But as judges,

men of law, it is not acted upon with anything like consistency,—that the extent in which it is departed from is little, if at all, less than that in which it is observed,—will also appear as we advance. No man, not even a judge, was ever absurd enough to pay the smallest regard to it in the bosom of his own family. Yet, somehow or other, (such is the force of prejudice, especially when produced and supported by power), it has had the effect of causing the characters of party and witness to be generally considered as incompatible and mutually exclusive.

It will be seen as we advance, that, among the numerous instances in which a party is admitted, and even compelled, to act in the character of a witness, there is not one in which his reception in that character can in that instance be justified but by reasons which apply with equal force to justify it in every other instance,—in the instances in which he is not compelled, or not admitted. By the caprice or sinister policy of men of power, a man may be excluded from being heard, in the character of a *deposing* witness; but, at any rate, he can not be prevented from having existed, in the character of a *percipient* witness. He may be excluded from speaking in a court of justice; but he cannot be prevented from having seen, or heard, or felt, whatever may be to be seen, or heard, or felt, in other places.

Meantime, numerous (as it will be seen) are the cases, in which arrangements that apply with propriety to the case of a witness who is at the same time a party, do not apply with propriety to the case of a witness who is not a party to the cause; and *vice versd.* On this account, in speaking of a witness, it is absolutely necessary to adopt some mode of distinction, to denote whether he does or does not stand in the relation of a party to the cause. To this purpose may be employed, on the one hand, the adjunct *extraneous*, the phrase *extraneous* (or say *non-litigant*) witness; on the other hand, the phrases *self-regarding witness*, *non-litigant witness*, *deposing* or *testifying party*. Of the extraneous or non-litigant witness, the *testimony*, the *deposition*, the *evidence*, may accordingly be termed *extraneous testimony*, *deposition*, *evidence*; of the litigant witness, the *deposing* or *testifying party*, *self-regarding testimony*, *deposition*, *evidence*.

as well as witnesses, are men, both of them exposed, though not altogether equally exposed, to the seduction of sinister interest; the station of the judge is not, any more than that of the witness, to be wholly overlooked in the precautionary arrangements taken on this ground. As it may be, in a certain sense, the interest, and at any rate the endeavour, of the witness, to suppress the truth, in the whole, or in part, so may it be that of the judge: as it may be the endeavour of the witness to convey false impressions to the judge, so may it be that of the judge to receive, or to have a pretence for acting as if he had received, such false impressions, in preference to true ones. In a certain sense, the judge will always have an interest in receiving the evidence in an incomplete state; because the further it is from being complete, the less his trouble. One species of sinister interest there is, the *love of ease*, by which, on every occasion, the judge will be prompted to receive the evidence in an incomplete state. The influence of this cause of seduction will become but too manifest as we advance.\*

This interest is, on this occasion, the more dangerous, inasmuch as it is opposed with so little force by the tutelary sanctions, the political and the popular; and its agency is so little apt to betray itself to the eyes of those to whom the application of the castigatory force of these sanctions respectively appertains. The exertions a man makes in this way, to preserve himself from trouble, are oftentimes scarce per-

\* See Book IX. EXCLUSION.

ceptible even to himself. Against corruption on the part of a judge, all mankind are up in arms; all mankind are constantly upon the watch: ready to impute it, upon strong grounds, upon slight grounds, and sometimes without any grounds. To precipitation, to inattention, on the part of the judge,—his suitors, his auditors, his superiors, in short, mankind in general, are comparatively inattentive.

The transgression of the deponent is as nothing, any further than as it is productive either incidentally of vexation, expense, and delay, or ultimately of misdecision, the transgression of the judge. But of the judge's possible sphere of transgression, that of the deponent forms no more than a part. On the part of the judge, misdecision may indeed have been produced by some transgression (occasioned either by his inattention, or by his ill-directed attention) on the part of the evidence. But it is equally possible for the judge to transgress, to misdecide, without any regard to the evidence.\*

Correspondent to the nature of the several imperfections, is that of the respective remedies. To incorrectness and mendacity,—detection; and thence, if possible, correction, by the substitution of correct evidence in the place of it. To incompleteness,—detection of the incompleteness, and thence acquisition of evi-

\* In general, whatever security serves to guard the station of deponent, by operating as a check to transgression in his sphere, will apply, with more or less efficiency, to the station of judge, by operating as a check to transgression in that superior sphere. But there are some, publicity for example, that apply, either exclusively or with a more particular energy, to the station of judge.

dence concerning the facts, not brought forward by the evidence in its original incomplete state.

A remedy of a higher nature than the above—a remedy never to be lost sight of in such remedial measures, such securities for trustworthiness, as come to be employed,—is *prevention* in the first instance: prevention of incorrectness and mendacity, especially the latter: prevention also of incompleteness.

But the two objects—detection on the one hand, prevention on the other—these two objects, distinct as they are in a theoretical view, will, in a practical point of view, be found to coincide. Why?—because the one of them cannot be pursued but through the other: the means by which the prevention of the mal-practice is aimed at, being no other than those, by the use of which, supposing the mal-practice hazarded, detection, it is wished and expected, may ensue. The witness is encompassed with the fear of detection, and of the unpleasant consequences in its train; a misadventure which he sees ready to befall him, in the event of his swerving from the path of truth. The prospect of this miscarriage is before his eyes; and, by the fear which it inspires, the wish and expectation is, that his footsteps will all along be confined to that desirable path, the only one that leads, directly at least, to justice.

By the detection and correction of the above several imperfections on the part of the evidence; the danger of the correspondent failures on the part of the judge, viz. deception, and non-information, and in either case misdecision, is obviated, as far as that danger has its source in the tenor of the evidence.

To the above imperfections and dangers, the remedies immediately applicable are as above. These, however, being altogether obvious, too completely so to be the objects of remark, are not the remedies, are not the securities, we are in quest of. If they are worth mentioning here, it is only in the way of memento, not of instruction, and for the purpose of keeping the line of investigation and arrangement unbroken and complete. The remedies that require research, and are of a nature to pay for it by their importance, are those remedies of a higher order that will meet us a little farther on, under the appellation of *securities* for trustworthiness in testimony.

Among these, so far are they from being obvious, we shall find some, and those among the most efficient, which, with a comparatively narrow exception, have hitherto remained hidden from the eyes of the most enlightened nations on the globe.

## CHAPTER III.

### INTERNAL AND EXTERNAL SECURITIES FOR THE TRUSTWORTHINESS OF TESTIMONY ENUMERATED.

CORRECTNESS and completeness may be called the primary qualities desirable in testimony. There are others, which may be called secondary qualities, and which are desirable for the sake of the primary.

To facilitate the conception and comprehension of the several secondary qualities that promise to operate, on the part of an aggregate mass of testimony, in the character of securities for its trustworthiness, that is to say, for its correctness and completeness; it may be of use that the reader should, in the first place, be in possession of a naked list of them. From the inspection of that list, some general conception may be formed of them in the first instance: by a separate consideration of each article, that conception will be cleared and fixed as we advance.

To avoid the harsh effect which would result from the finding or making an abstract appellation correspondent to each quality, it may be necessary to discard the corresponding

list of substantives, and confine ourselves to adjectives.

In relation then to an aggregate mass of evidence, and to each the several testimonies of which it may happen to be composed, there will be, or there may be (let us say) reason to desire that it may be as follows:—

1. *Particular*; as particular as possible: as special as possible, down to individuality: and besides that, circumstantial; of which distinction in its place.

2. *Recollected*; sufficiently recollected: the deponent, before the delivery of his testimony is concluded, having possessed and employed whatever portion of time may have been necessary to his bestowing upon it the primary qualities of correctness and completeness.

3. *Unpremeditated*: that is, not sufficiently recollected for any such purpose as that of mendacious invention. This and the preceding quality are evidently opposite to each other, and to a certain degree incompatible. To determine how to reconcile them in so far as they may be reconcileable, and which to sacrifice in so far as they may be irreconcileable, will be amongst the nicest and most difficult problems that can be presented by the subject to the skill of the legislator.

4. Assisted by suggestions *ab extra*; viz. in so far as such suggestions may be necessary to the assistance of recollection—true unfeigned recollection.

5. Unassisted by mendacity-serving suggestions *ab extra*: unassisted by any such suggestions, true or false, as, in case of a disposition to mendacity, may enable the deponent to

give to his mendacious statements an air of truth, so as to enable him to produce the deception he aims at producing, in the mind of the judge. Another pair of opposite qualities—further demand for reconciliation as far as practicable, and, beyond that point, for sacrifices on one or both sides.

6. *Interrogated*: called forth by interrogation: by examination—questions—interrogatories,—and, for the sake of correctness and completeness, these questions put on all sides—put by every individual in whose person a mass of appropriate information, qualifying him for putting *apt* questions (*i. e.* questions calculated to contribute to the trustworthiness of the testimony, either in the article of correctness or in the article of completeness) is united with a degree of interest, and thence with a degree of zeal, sufficient to produce the exertion necessary to the purpose.

7. *Distinct* as to the expression. Of indistinct expression the consequence may be, either to cause the testimony, though correct, to produce the effect that would have been produced by testimony of a different purport, and failing in respect of correctness or completeness; or, by appearing to express something, when on a clear examination it would be found to express nothing, to preserve a witness whose discourse has been no more than equivalent to silence, from affording those indications, which silence, when manifest, affords in the character of circumstantial evidence to the prejudice of the sincerity and probity of him by whom such reserve is persevered in.

8. Expressed by *permanent* signs: such, for example, as those of which written discourse is composed. If, destitute of the support of those permanent signs, it be limited to such evanescent signs as those of which oral discourse is composed, it will be liable to produce deception, as in case of indistinctness: unrecalled, when occasion comes for recollecting it, it will be tantamount to silence, except as to the affording of those instructive indications which silence is so frequently calculated to afford in the character of circumstantial evidence: misrecalled, it will, though originally correct, be converted into some modification or other of incorrect, erroneous, and perhaps deceptitious, evidence.

If substantives correspondent to these several adjectival expressions—abstract terms corresponding to those several concrete terms—were already in use or capable of being put into use, they would be equivalent to those which follow; of which some are already in use, others have been constructed for the purpose.

1. Particularity.

2. Recollectedness: viz. to the purpose of correct and complete information.

3. Unpremeditatedness: viz. to the purpose of mendacious invention.

4. Suggestedness: viz. in so far as necessary to the purpose of correctness and completeness.

5. Unsuggestedness: viz. when not necessary to these purposes; more especially when conducive to the purpose of mendacious incorrectness, or its equivalent, intentional suppression, productive of intentional incompleteness.

6. Interrogatedness : if a conjugate of so harsh a form may, for the purpose of the moment, be endured.

7. Distinctness : viz. in point of expression.

8. Permanence : viz. in respect of the nature of the signs to which it is committed.

Such is the list of qualities that have presented themselves in the character of securities, *internal* securities, for trustworthiness, for correctness and completeness, in the aggregate mass of testimony. It remains to bring to view those arrangements which present themselves in the character of *external* securities, with reference to the same purpose : arrangements tending to secure, on the part of a mass of testimony, those desirable qualities, which have been enumerated under the name of internal securities. These seem all of them referable to one or other of the following heads, viz.

1. Punishment : (including, in case of special injury to individuals, the burthen of satisfaction in so far as it tends to operate in the character of punishment) : arrangements calculated to attach punishment, in the character of an eventual consequence, to incorrectness or incompleteness of testimony, when accompanied with blame, whether in the shape of mendacity or temerity. In case of manifest mendacity or intentional silence, on the part of defendant or plaintiff, when called upon to depose ; loss of cause, that is, loss of the advantages, or subjection to the inflictions, at stake upon the cause, may be considered as a sort of virtual punishment, growing naturally out of the offence.

2. Oath : arrangements attaching the sort of ceremony so called to the act of deposition,

for the purpose of causing punishment from a supernatural source to attach upon the act; in case of mendacity; a species of misbehaviour, which, on the occasion of the association so formed, receives the appellation of *perjury*.

3. Infamy: arrangements followed, or designed to be followed, by the effect of attaching to false testimony, through punishment or otherwise, the sort of ideal burthen characterized by a variety of denominations, such as infamy, ignominy, shame, disgrace, dishonour, disrepute: in other words, causing the punishment of the moral or popular sanction to attach upon the offence.

4. Interrogation: arrangements conferring on the different classes of persons already spoken of, those powers, the application of which to the deponent produces on his part an obligation more or less coercive and efficient, in respect to the furnishing such ulterior information as the questions put in virtue of such powers, call for at his hands. To this head belongs, in the language peculiar to the English law, cross-examination, and its opposite, examination in chief.

5. Reception in the *viva voce*, or ready-written form, or both, according to circumstances arrangements leaving it in the power of the judge, under such restrictions (if any) as may be needful, to receive the testimony in the one form, or in the other, or in the one after the other, according to the exigencies of each individual case: in the *viva voce* form, to save the superior expense, delay, and vexation, incident in general to the ready-written form, and to avoid giving facility to mendacious invention:

in the ready-written form, when ulterior time for recollection and methodization seems requisite to the purpose of correctness and completeness, and when the expected advantage in these respects is such as promises to overbalance the delay, vexation, and expense.

6. Notation: or say recordation, registration, scription, note-taking, minute-taking, minuting down the evidence: the operation, by which, testimony, when delivered in the *vivā voce* form, is made to receive the above-mentioned quality of *permanence*; and in that respect is, or may be, put upon a footing with ready-written testimony.

7. Publicity: arrangements tending to increase the number of the persons to whose cognizance the testimony, on the occasion of its issuing from the lips or the pen of the deponent, may convey itself. The virtue of this security applies itself partly to the station of the deponent, partly to the station of the judge: to that of the deponent, by leaving or throwing open the door, in case of incorrectness or incompleteness, to correction and completion by opposite or supplemental evidence: to both stations, by giving (by the same means) increased probability to eventual punishment, viz. legal punishment, and by introducing and strengthening the force of that punishment of the moral sanction, which for its application neither requires, nor is accompanied by, the forms and ceremonies of procedure.

To this head belong the arrangements indicated by the words *open doors*, courts of sufficient amplitude, liberty of publication, publication by authority, whether of the minuted

*vivè-voce* testimony, or of the ready-written depositions.

To this head also belongs the opposite of publicity, *privacy* or *secrecy*, in so far as any case may arise presenting a sufficient demand for arrangements directed to that end. In some cases, secrecy may be subservient to correctness and completeness; viz. by withholding from a mendaciously-disposed deponent mendacity-serving information: in other cases, whatever use it is susceptible of will be confined to the prevention of vexation—of that vexation, which, it will be seen, is liable to spring in various shapes out of the communications liable to be made by the unrestrained divulgation of judicial evidence.

8. Counter-evidence: arrangements for giving admission to such evidence from whence opposition may come to be presented to the testimony in question: evidence tending to the correction of it, and thence convicting it of incorrectness, or to the filling up of the deficiencies intentionally or unintentionally left in it, and thence convicting it of incompleteness.

9. Investigation: arrangements designed or tending to promote the discovery of one article of evidence through the medium of another: the discovery of a lot of testimonial evidence, for example, of a sort fit to be lodged in the budget of ultimately employable evidence; whether the article, by means of which it is discovered, be, or be not, itself fit to be so disposed of, fit to be attended to in that character: the finding out, for example, a person who was an eye-witness of the transaction, by the examination of a person who was not himself an

eye-witness of it, but heard the other speak of himself as having been so.

Arrangements competent to the process of investigation, as here described, are in every case necessary, to preserve the aggregate mass of evidence from being untrustworthy and deceptitious on the score of incompleteness.\*

The list of arrangements presenting themselves as capable of being employed in the character of securities against deception and misdecision, being thus numerous and multifarious; to enable the mind to obtain a clear and comprehensive view of them, in respect of their mutual relations,—to observe in what respects they severally agree, in what others they disagree, and how it is that these different means co-operate in their several spheres, and become conducive to the common end,—it may not be amiss to divide them into groups.

1. In the first group come the topics of punishment, oaths, and shame—all considered as capable of being applied for the prevention of false testimony; each of them indicative of a mass or source of evil, by the fear of which it is designed that a person, exposed to the temptation of delivering false testimony, shall be deterred from the act. So far as these three articles are concerned, the object of the legislator is, so to manage, as that a person exposed to the temptation of falling

\* This last article in the list of securities, which, as the reader will have seen, is a security, not for the correctness of any one article of evidence, but for the completeness of the whole mass, belongs to the head of Forthcomingness, which was reserved by the Author to form part of a work on Procedure.—*Editor.*

into that species of delinquency, by which false testimony, and with it, the danger of deception, is produced, may never be without an adequate motive (at least, a motive bidding as fair as possible to prove adequate) for strengthening him against the temptation, in such manner as to prevent his yielding to it. The course taken by these three securities for restraining the person in question from falling into the obnoxious practice, is by operating upon his will; and that in such manner as to overcome, in a direct way, whatever inclination he might otherwise have to do those things, which in this case ought not to be done.

2. In the next group come the securities, which, without applying directly to the will of the deponent, aim at doing whatsoever may, without preponderant inconvenience, be possible to be done, towards depriving him of the power, (supposing on his part the existence of the inclination) to give into the obnoxious practice. To this head belong the taking away the faculty of premeditation (premeditation considered as a source of falsehood) so far as can be done without prejudice to recollection, to recollection considered as a source of truth: and the depriving him of the faculty of receiving, from without, mendacity-serving information (information considered as a source of falsehood) without prejudice to the faculty of receiving, also from without, veracity-serving information, information considered as a source of truth; that is, information for the assistance of the faculty of recollection; the only way in which information from without can in any way be contributory to that useful purpose.

3. To the third group belong those securities which operate by lending the powers of the law to the procurement of all such evidence as the case happens to afford, thereby preventing such incorrectness and incompleteness in the aggregate mass of evidence (incompleteness amounting, in some cases, to the total absence of all evidence) as might be the result of such evidence, when delivered, as happened to present itself without the assistance afforded by those powers. 1. General powers for compelling answers to interrogatories. 2. Powers for insuring the production of evidence operating as counter-evidence to what would otherwise have been delivered. 3. Powers for investigation of evidence: *i.e.* for obtaining the testimony of one man, by means of indications given of it by the testimony of another.

4. By itself (there being nothing either to contrast or match with it) comes *publicity*: an instrument of multifarious application and use: an instrument, the destination of which seems to be (like that of the grindstone and the hone) to give power and efficiency to all those other instruments: augmenting the tutelary force of punishment and shame, and extending and promoting the application of it to all the characters of the forensic drama—to parties, extraneous witnesses, and judges—care being taken not to push the application of it in such manner as, by affording mendacity-serving information to the ill-disposed, to contravene the ends of justice in one way more than it promotes them in another; nor by preponderant vexation to outweigh the advantage produced in respect of those direct ends, by inconveni-

ence produced in respect of the collateral ends of justice.

5. By itself again (there being nothing either to contrast or match with it) comes the use of *writing*; the application of that handmaid of all the other arts and sciences to the particular use of judicial practice, and of that branch of it in particular which concerns testimony: a security to which publicity itself is indebted for the greatest part of its existence, and all those other securities (including testimony itself) for their permanence.

For the exhibition of these arrangements, no novelty will be produced, no force of invention will be employed. I do but copy: the pattern, approved by the experience and applause of ages, is furnished by established practice: what features of novelty may be found, will be confined to the exhibition of the use and reason of each arrangement, and to the claim made to the tribunal of common sense and common honesty for the steady and constant use and employment of those instruments of truth and justice, the existence of which is undisputed and indisputable.

Yes, so it is: it is from the established order of things, and from that alone, that the above list of securities for testimonial trustworthiness is deduced: but, if the virtue of them were turned to the account to which it might and ought to be turned, the changes that would be made in the established order of things would not be inconsiderable.

In the estimation of the propriety and utility of these several securities,—the main end, rectitude of decision, with the more particular ends

on this occasion subordinate to it, viz. prevention of incorrectness, mendacity, incompleteness, and consequent deception, as above, will not be the only objects to be kept in view. The collateral end,—the avoidance of collateral inconvenience, in its triple shape of vexation, expense, and delay,—ought never to be out of sight.

The uses pointed out as resulting from the several proposed securities, the uses employed in the capacity of *reasons* to justify the recommendation given of them, will be drawn partly from one of these sources, partly from the other.

At the tail of the group of expedients, in and by which it is altogether proper, and more or less customary, for the legislator to take an active part in the service of truth and justice, seems to be a proper place for putting him upon his guard against the expedient, of which in the same view so abundant, and in every instance so unhappy, a use has been made: viz. the exclusion of proffered testimony,—not on the ground of its irrelevancy, of its uselessness in that character, of its worse than uselessness in respect of the expense, vexation, and delay, with which the delivery and receipt of it would be attended,—but on account of the danger of its becoming productive of deception, and thence of misdecision, on the part of the judge: a vain, but unhappily too prevalent terror, of the vanity of which proof will require to be given in its place.

## CHAPTER IV.

### ON THE INTERNAL SECURITIES FOR TRUST-WORTHINESS IN TESTIMONY.

#### 1. First internal security, *particularity* of the statement.

In this respect, we may conceive the statement as resting altogether in generals, or as descending lower and lower in the region of particulars, till at last everything is in such a degree particular as to become individualised : persons, things, portions of space, and portions of time.

The more particular it is, the more instructive, the more satisfactory, the more trustworthy. Why? The reason is very simple. The more completely it thus descends into particulars, the more matters of fact it contains and exhibits, in respect of each of which, supposing it to vary from the truth, its variation is liable to be disproved, and the witness convicted of mendacity, or error at least, by other evidence. Every step it takes in the region of particulars, whether downwards in the *Porphyrian* scale, or sideways all round in the field of *circumstances*, affords an additional security. The degree of

particularity proper to be insisted on in each case cannot be indicated by any description applicable to all cases. But, in jurisprudential practice, examples are not wanting of a degree of generality so vague, that, to a judgment unblinded by prejudice, it will be manifest at first glance that scarce any the slightest degree of trustworthiness can reasonably be attached to it. Yet, in these very instances, the testimony has not only been received, but treated as conclusive.\*

Hence one cause of the comparative untrustworthiness of purely spontaneous testimony. Why? Because, by the supposition, there being no room for interrogation, the degree of particularity rests altogether at the deponent's choice. In the function and right of putting questions, is included the right of commanding the deponent to descend to any degree of particularization, of which, with or without any deceptive design on his part, he may have stopped short.

Give to any person, for example to the judge, this scrutinizing power,—the testimony, supposing, it to abide this test, possesses a degree of trustworthiness which otherwise could not have belonged to it.

Under the head of particularity, two qualities may be included;—speciality, or rather individuality—and circumstantiality: qualities, which, how intimately soever connected, will be found distinct in their nature, and in some respects in their application to the purpose now in hand.

For the purpose of forming a ground for decision,

\* Ex. gr. Wager of Law.

so long as the fact is in other respects exposed to doubt, a relation is never particular enough, unless the fact be individualized, that is, fixed and circumscribed in respect of time and place.

Titius has killed a man: a relation to this effect is as yet no evidence; though repeated by a hundred deponents, each declaring himself an eye-witness, this would not as yet be ground sufficient for a decision pronouncing Titius convicted of homicide. Titius has killed an Englishman or a Frenchman, an old man or a young man, a tall man or a short man,—by no such specification would the deficiency in the former relation be sufficiently supplied. Titius has killed Sempronius: this is nearer the mark, but neither is this sufficient. At what *time* was the act committed? In what year, month, day, hour? In what *place*? In what province, township, road, field, garden, house, room in the house? It is not till all these points have been fixed, that the fact has been individualized: and till the fact has been thus individualized, the evidence is scarce as yet brought to the level of direct evidence: it hangs still in the air, in the character of circumstantial evidence.

*Quis? quid? ubi? quibus auxiliis? cur?* quomodo? quando? says a verse, useful for memory, and to be found in the institutional books of ethics.

By the *ubi* and the *quando*, place and time are designated; and, by the answers to those questions, if sufficiently particular for the purpose, the fact is *individualized*.

As to the other questions, so far as they go; by the answers to them, the fact, besides

being individualized, is circumstantialized, circumstantiated.

So many circumstances, so many criteria by which, supposing the testimony false in any point, the falsity of it may be indicated and detected. Hence, the more circumstantiated the testimony, the greater the security it affords against deception, and consequent misdecision, on the part of the judge.

Between speciality and circumstantiality there is this difference. Circumstances which contribute to the giving speciality, down to individuality, to the statement, will all of them be found relevant to the purpose or object to which the testimony is directed: to the substantiating the demand, or the defence: to the shewing that the individual fact in question belongs to the species of fact to which the law has intended to annex such and such consequences. They belong, accordingly, to the list of those circumstances, which, in so far as they happen to be present to his recollection, it is proper that he should bring to view in the first instance.

To the head of circumstantiality, considered as distinct from speciality and individuality, belong all those circumstances which, without being relevant to the purpose in question, may yet serve as tests or criteria of the correctness of the deposition, of the veracity and attention of the deponent.

Being, with respect to the purpose in question, irrelevant, they will not come with propriety from the deponent in the first instance. But if (as by interrogation) it be required of

him to give to his statement the additional extent in question, an extent that shall embrace the circumstance or circumstances indicated to him for that purpose; in that view it is, that, the question being relevant, the answer will be so too, and both question and answer proper and instructive.

Take, for example, the case of Susanna and the two Elders. To the head of speciality, down to individuality, belonged the several circumstances which these false accusers thought it advisable to bring to view of their own accord, for the purpose of producing, in the mind of the judge, a persuasion of the delinquency of the intended victim of their malice.

But, by way of test of their veracity, the ingenuity of her advocate suggested, and called upon each of them to speak to, a topic in itself irrelevant. Affirming that it was under a tree that the fact was committed, and that in the supposed scene of the transaction trees of different sorts were included,—of what sort was that tree? The witnesses being examined out of the hearing of each other, each out of the way of receiving mendacity-serving information from the other,—one pitched upon a tree of one sort, the other upon a tree of a different sort: and, by this mutual contradiction, the falsity of their statement was detected.

Whether under a tree, or not under a tree,—and if under a tree, under what sort of tree,—were circumstances, the irrelevance of which, with relation to the guilt of the supposed transaction, was altogether manifest: but, from the contradiction thus produced, these irrelevant circum-

stances acquired a sort of accidental relevancy; and the purpose, for which they were brought to view, was accomplished.

### 2 and 3. *Recollectedness, and unpremeditatedness.*

These qualities are, as logicians say, *simil naturā*: and *prima facie* directly opposite, and mutually exclusive of one another.

Recollectedness to every good purpose, unpremeditatedness to every bad purpose: recollectedness to the purpose of a man's searching into the storehouse of his memory, and spreading out before the judge the articles it contains; unpremeditatedness to the purpose of a man's setting his judgment and invention to work upon these same articles, in the view of suppressing, disguising, or altering, any of the facts his memory has furnished him with, or delivering false facts in lieu of them, or along with them. Even in this closer view, the two qualities still present themselves as mutually exclusive and incompatible. For, if recollection be necessary, time must be allowed for it: and unless it be by the allowance of suggestion, (of which presently), it is only by the allowance of time that any assistance, tending to put the testimony in question in possession of this quality, can be afforded by the legislator. But, if time be allowed for this honest and desirable purpose, what shall hinder its being employed for the opposite dishonest and undesirable one?

Notwithstanding these unfavourable appearances, a still closer view will shew it not to be altogether out of the reach of the ingenuity of the legislator to afford the necessary assistance

to the desirable result, and at the same time to throw no inconsiderable obstruction in the way of the undesirable one.

No man but must have felt, no man but feels every day of his life, the necessity of recollection for his own use,—the necessity of recollection, and thence of time to be applied to that purpose: for his own use, and therefore when the existence of any desire to deceive is impossible.

As to the quantity of time that may by possibility be necessary to this purpose,—necessary to a man in the character of a deponent,—there is scarce any assignable limit to it. Does Titius owe anything, and what, to Sempronius? To enable the deponent to find an answer, and that with truth and full assurance, perhaps not a second of time may be necessary, perhaps a number of weeks, or months, not to say years. Titius and Sempronius are both merchants, dealing to all parts of the world: the accounts between them are long and complicated: or, Titius is an executor, his testator a man possessed of large property in a variety of shapes, burthened with a variety of debts, among assets and among debts a number of articles depending upon so many diversified contingencies.

Nor is the demand for recollection terminated in every instance by the moment which completes the delivery of the testimony. Forgetfulness or mis-recollection is but too frequent, when it is for a man's own use that he makes his search, and when, as before observed, the existence of any desire to deceive is impossible. But if the testimony brought out in the first instance has been in any material respect in-

correct or incomplete, there remains a demand for ulterior recollection on the part of the same deponent; recollection, if possible, of new facts, for the correction or completion of the mass delivered in the first instance.

It is for this contingency that we shall see provision made by design, though with a hand not always equal, and sometimes rather scanty, under the names of *repetition* and *recolelement*, by the Roman law: as also (though without a name, because without design, and consequently in some instances with great redundancy, in other instances not at all), by English law.

4 and 5. *Suggestedness* and *unsuggestedness*: the quality of having been assisted by suggestions to every good purpose, and the quality of not having received any such suggestions to any bad purpose.

Between this pair of antagonising qualities and the former, there is manifestly a very intimate connection. And here again recurs the mystery, by what contrivance the good purpose can be promoted without the bad, the bad obstructed without the good.

The same experience, the same constant and universal experience, which evinces to every man the need he may have of whatever information can be derived from his own memory, evinces to him also the need he may have of whatever assistance can be derived to his memory from the memory of others: and that too, where the existence of any desire to deceive, or to be deceived, is alike impossible.

On this ground, as on the former, first appearances are apt to be fallacious; shutting out

a hope which a closer scrutiny will shew not to be an unreasonable one. To suggestions from without, what possible obstruction can ever be thrown, it may be asked, by any obstacle which it lies within the power of the legislator to apply ?

When a man delivers false testimony, what there is of falsification in it may be either of his own invention, or of the invention of some one else : either home-made or imported.

Made at home or abroad, the inventor of it must have had a stock, a ground, composed of true facts, to work upon.

To the true man, knowledge of facts, of any other facts than what are presented to him by his own memory, is of no use. Why ? Because all true facts are consistent with each other : his facts being true, they cannot receive contradiction from any other facts that are so likewise.

To the mendacious deponent, on the contrary, knowledge of other connected facts is indispensable : his stock of this sort of information cannot be too extensive, for his security against detection : it can never, indeed, be sufficiently extensive : because every true fact that has any discoverable bearing upon the case, presents a rock upon which, if unseen, his false facts, one or more of them, are liable to split.

So they be but relevant, true and false information may be alike subservient to the purpose of the mendacious deponent : or rather, on the single condition of being relevant, truth cannot but be of use to him ; whereas, the use he can make of suggested falsehood will depend, not only upon its being well adapted to his mendacious purpose, but also upon its being better

adapted than any which his own invention could, on that same occasion, have supplied him with.

Upon this view, the importance of the quality of unsuggestedness appears already in its true light: at the same time, the difficulty of promoting it by any arrangements within the power of the legislator, presents itself as yet in a false, and, happily, an exaggerated light. What are the problems that seem to present themselves to him for a solution? Required, on the present occasion, to exclude a man from all intercourse with his fellow men,—on the former occasion, to deliver him from all access to his own thoughts, from all communication with himself.

Thus much indeed is true, that in every instance there exists a point of time, down to which recollectedness and suggestedness are qualities of which no man's testimony can be deprived, unpremeditatedness and unsuggestedness qualities which no ingenuity on the part of the legislator can endow it with. Equally true it is, that, from and after that point of time, no inconsiderable degree of security is actually produced (not to speak of what may be produced) by arrangements lying within the power of the legislator and the judge. What will also be seen is, that, from the commencement of this period, there is no such absolute incompatibility as hitherto there has appeared to be, between the antagonising qualities compared with one another; between recollectedness and unpremeditatedness,—between suggestedness and unsuggestedness: no such incompatibility but that a sufficient portion of time to a good purpose, time applicable to the purpose of recollection,

and opportunity sufficient for receiving information assistant to that same purpose, may be allowed to a deponent, while the time and information capable of being employed in the fabrication, or receipt and adoption, of false and mendacious testimony, may, in no inconsiderable degree, be kept out of his reach. But the designation of this critical point of time, as well as the delineation of the requisite system of arrangements commencing at that same date, will be more clearly apprehended, when, under the head of external securities, we come to speak of interrogation.

#### 6. *Interrogatedness.*

A mass of testimony, extracted from a man by the process of interrogation, will almost always be more or less different, in substance as well as in form, from the testimony of the same man on the same occasion if spontaneously delivered, without the assistance or controul of any such operation. To the external security created by that process, corresponds, therefore, an internal security, afforded by the texture which, under the influence of that operation, the testimony itself has been made to assume. Nor is the case materially different, where, a mass of testimony having been delivered in the first instance without the aid of interrogation, the extractive force of that process is afterwards employed in adding to the original a supplemental mass.

It is by interrogation, and not without interrogation, that testimony too general for use is brought down to individuality, and clothed with instructive circumstances : it is by interrogation; and not without interrogation, that indistinct

testimony is rendered distinct—cleared from the clouds in which it has involved itself, or been involved.

It is by interrogation, aptly and honestly applied, though not exclusively by interrogation, that testimony is assisted by information subservient to it in respect of correctness and completeness. It is by the skilful application of this instrument that a mass of testimony, while left in possession of that degree of recollectiveness which is necessary to correctness and completeness, is deprived of the quality of pre-meditatedness in a state of things in which the time demanded on pretence of recollection, might be but too apt to be employed to the purpose of fraud.

7. *Distinctness.* Distinctness, like health, is a negative quality in the garb of a positive one. Health, in the natural body, is the absence of disease: distinctness, in a body of evidence, is the absence of a most pernicious disease called indistinctness: a disease for which, as will be seen, under the natural system of procedure in its original simplicity, there is no place; a disease, which owes its birth in most cases to the implanting hand of the regular-bred practitioner. Even when not planted by art, the seeds of it are attached as it were to the nature of written evidence: in *vivâ voce* evidence, if for a moment it makes its appearance, interrogation, if admitted, drives it out the next.

An article of testimony, so long as it is indistinct, may be neither general nor particular, and neither true nor false. Until subjected to that process, by which it may be ascertained

whether the confusion in it be the result of honest weakness or of dishonest artifice, no indications, no decision, can be justly grounded on it. It is worse than false evidence, it is worse than no evidence: for, from falsehood, when seen to be such, as well as from silence, indications highly instructive may be, and are, every day deduced: but from indistinct testimony, till it be understood to be tantamount to silence, nothing can be deduced.

#### 8. *Permanence.*

So great, as must be obvious to everybody, is the importance of this quality, that, till the means, the only means of producing it, came into use, justice must everywhere have stood, or rather floated, upon a basis comparatively unstable.

Purport depends upon tenor, effect and substance upon words: and if the words are forgotten, or doubtful, or in dispute, on what sort of foundation is it that the decision has to ground itself? Everything may come to depend on the question whether this word or that word, whether this word has or has not been employed: and when the decision on this question rests on the memory of one man, opposed by the memory, or pretended memory, of another, justice is thus left to be the sport of fortune.

For the effects of all kinds produced by it at the first moment after its utterance, a mass of testimony depends upon itself: but at every moment after the first (one may almost say without exaggeration) it depends upon its having, or not having, received the quality of permanence: in a word, to its having, or not

having, been clothed in the form of written discourse. Divest it of this security, it becomes each moment more and more liable to be changed or lost: having been correct, to become incorrect; having been complete, to become incomplete. For, the instrument whereby the effect is produced upon the mind of the judge, and of all other persons taking upon themselves at any subsequent period to contemplate it in the point of view in which it is contemplated by the judge, is—not the testimony itself, but that picture of it only which is present to the conception of him by whom it is so contemplated. So that, by the want of this one security, whatever care has, with whatever success, been taken to endow the testimony with those other qualities, may be lost.

Nor is it merely by its existence that this quality is productive of the desirable effects, in respect of correctness and completeness: even upon the mind of the deponent, at the very instant of giving utterance to his testimony, the assurance that nothing of it will be misrepresented or lost, will, by the force it gives to the truth-ensuring motives (whatever they may be) to the action of which he is exposed, operate with no inconsiderable force as a security for the attention requisite on his part to invest it with those primarily essential qualities.

Such is its importance in the case of a *bond fide* deponent: for even in the case of a *bond fide* deponent (especially if, being without interest of any kind, he be completely indifferent to the issue of the cause) a certain degree of attention on his part will be necessary to his

bestowing upon his testimony whatever degree of correctness and completeness it happens to be in his power to bestow upon it.

But to the supposition of *bona fides* and complete indifference, substitute that of mendacity, or even bias. In what case now lies the chance for correctness and completeness? It is not merely that there may be a deficiency in the force of the motives necessary to secure the measure of attention necessary to these qualities; but the motives by which the bias, or determination of mendacity, has been produced, act in a manner without check. The punishment or the shame a man may be exposed to by the falsehood of his testimony,—every security of this sort depends upon the words of it, upon the recollection which somebody has, or pretends to have, of them; and the words of it are liable, at all times, to be mis-recalled, or forgotten.

Before writing came into use,—in order to give the best hold that could be given upon the memory,—laws, moral sayings, and whatever other discourses were judged most worthy of remembrance, were clothed in rhyme or measure. But even among Italian improvisatores, where is the man, who, along with correctness and completeness, could give measure and rhyme to testimony?

Strictly speaking, it is only in respect of its influence on the mass of testimony in question, on the correctness and completeness of it, that the consideration of the quality of *permanence* belongs to the present head. But the correctness and completeness, the trustworthiness, of testimony itself, is no otherwise of importance

than in the character of a security against misdecision on the part of the judge. Suppose then the testimony vanished, or the purport of it a subject of doubt and dispute,—and, from any cause whatsoever, a disposition to misdecision, wilful or temerarious, on the part of the judge,—in what condition is the only check that can be opposed to it?

Independently of desert,—power and authority never fail to invest with a prodigious body of factitious credit the assertions, direct or implied, of every man who speaks from so commanding a station as the seat of judicature. Be the reclamations of the losing party ever so well founded, what degree of credence can they hope to find, when this security is wanting, against the testimony, the implied testimony, of the judge?

In this state of things, when, either from the mendacity of a deponent, or from the unrighteousness of the judge, a suitor has received an injury, on what basis stands his chance for redress?

Nor are the benefits that depend upon the permanence of testimony confined to the station of the suitor. If in this imperfect quality the unrighteous judge finds a necessary check, the righteous judge finds in the same quality a most desirable protection. On the testimony, as really delivered, he pronounces a decision aptly deduced from that testimony. But, from the clamour of rash or mendacious tongues, the testimony, or the extra-judicial accounts thus given of it, being misrepresented and mutilated, he finds himself covered with the obloquy

and disrepute due only to wilful misdecision and injustice.

Take away this security, and mark the contrast, the deplorable contrast, which is liable to be exhibited by the fates of the unrighteous and the righteous judge. The former reaps insecurity, the fruit of his unrighteousness. The latter, the righteous judge, suffers under the affliction which ought to have fallen upon the unrighteous one.

When justice was left to totter upon this fluctuating basis in the case of original judicature, what must have been its condition in the case of judicature upon appeal?

1. On the occasion of this fresh inquiry, if the evidence be collected *de novo*; every day, by helping to rub out the impression left upon the memory of the deponent, will lessen the probability of correctness and completeness in the testimony.

Every day, while it thus lessens the assurance for trustworthiness on the part of the testimony of the deponent, will lessen in the same proportion the security for probity, and on that ground the security against wilful misdecision, on the part of the judge.

If no part of the original mass of testimony but what is thus delivered *de novo*, be admitted, every day adds to the chance of deperition, by death, absentation, or latency, designed or casual, on the part of the deponents of whose testimony it was composed.

The expense and vexation attached to this second exhibition, is, moreover, so much added to the account of collateral inconvenience.

2. If the same witnesses be not thus heard over again, there remains no other alternative but that of hearing an account of the supposed substance of their testimony from some person who has been, or pretends to have been, present at the time of its being delivered.

But, in this way, all the above mentioned probabilities of incorrectness and incompleteness receive an indefinite increase: the whole mass of direct evidence is transformed and degraded into hearsay evidence.

Of the importance of publicity, a view will come to be taken in its place: but in how great a degree that external security will, for its possible extent and magnitude, be dependent on the permanence of the signs to which the testimony is committed, is obvious to every eye.

When the testimony was destitute of the quality of permanence, how precarious at best must have been the chance for justice, is but too apparent. But a circumstance not altogether so evident, nor yet unworthy of regard, is, in how great a degree this chance, such as it was, must have depended upon promptitude: understanding by promptitude, the shortness of the interval between the time of receiving the testimony, and the time of pronouncing the decision grounded on it.

Give permanence to the evidence,—delay no longer adds to its own appropriate and certain mischiefs, the danger of being productive of misdecision and ultimate injustice. A body of evidence hastily delivered, must be followed in every instance by a decision hastily pronounced: lest the traces left upon the memory of the judge be obliterated or distorted, the

decision must be pronounced at a period before the time necessary for due reflection has been completed, and before the tumult that may have been raised in his passions has had time to subside.

Many are the instances in which it happens that a mass of evidence, delivered or extracted on the occasion or for the purpose of one suit, may be applied with advantage to the just decision, or (what is much better) to the prevention, of another. But in how great a degree its use in this respect depends upon the permanence or impermanence of its form, is obvious at first sight. Give it but permanence, commit it but to writing,—the same mass of evidence may be applied to the decision or prevention of any number of suits, and this, without any considerable addition to vexation or expense; whereas, without this instrument of economy, the quantity of each inconvenience would be to be multiplied by the number of such suits.

## CHAPTER V.

OF PUNISHMENT, CONSIDERED AS A SECURITY  
FOR THE TRUSTWORTHINESS OF TESTIMONY.

SECTION 1.—*Species of falsehood—Necessity of substituting the word Mendacity for Perjury.*

AT the head of the factitious securities for the trustworthiness of testimony, punishment, punishment by appointment of law, must stand without dispute. It is indispensable, for the purpose of securing the preponderance of the tutelary over the seductive motives. After this security, a number of others will be brought to view: but a property common to almost all of them, is, the assuming the existence of this primary security: they will be found to consist principally of so many expedients, having for their object the application of this indispensable security to the best advantage.

Falsehood, as already intimated, may be either free from blame, or accompanied with blame. When free from blame, it is rendered so by circumstances (such as invincible ignorance), the effect of which is to preclude the possibility of employing punishment to any advantage.

When accompanied with blame, it is, in the mind of the individual, either accompanied or not with the consciousness of its own existence. If accompanied with that criminal consciousness, it then comes under the denomination of *mendacity*.

If not accompanied with the consciousness which renders it thus criminal, and yet accompanied with blame; it is because, though a man had no complete persuasion,—possibly not so much as that faint commencement of persuasion called *suspicion*,—that what he was saying was false, yet had he bestowed on the subject that attention which, on legal or moral grounds, was due, the falsity of such his testimony would have been perceived by him, or at least suspected: in which case, if, without making known such his suspicion, he had delivered such statement notwithstanding, it would thereby have been accompanied and tainted by mendacity. Falsehood thus accompanied with blame, but with an inferior degree of blame, may be termed falsehood through or with *temerity*. And thus we fall in with a known and most useful distinction of Roman law.\*

\* With *mendacity* a work on the law of evidence has no direct concern, any further than as the falsehood, thus characterized, is delivered on a judicial occasion or for a judicial purpose.

When thus delivered, it is apt to be accompanied with circumstances, from whence it has derived so many appropriate names. A brief mention of them can scarcely be dispensed with here.

1. Where, for impressing on the mind of the individual in question the desire and endeavour to steer clear of falsehood by adhering to the line of truth, the sort of ceremony known by the name of an oath (of which further on) b

In a former book occasion presented itself for observing, how close the connection, how fre-

been employed; mendacity in this case has received the name of *perjury*.

2. When the mendacious assertion has had for its subject-matter an article of written evidence; being employed in the endeavour to obtain credence for a spurious script fabricated, or a genuine one altered for the purpose of deception; it has received the name of forgery: though, in strictness of speech, the appellation of the forgerer belongs only to the man, who, for the purpose in question, fabricates or alters the script; and who, for the application of it to its intended criminal purpose, frequently trusts to some other individual, by whose mendacious representations endeavours are to be used for causing it to pass for true. In this case, if the criminal labour be divided between two persons, and the appellation of forgerer be applied to both, the one may be distinguished by the name of the *operative* forgerer, the other by that of the *uttering*, *exhibiting*, or *circulating* forgerer. In this shape, even when employed on a judicial occasion, the false conception may be conveyed, the mendacity uttered, by *deportment*, as well as by language.

3. Mendacity considered as having deception for its object (and it seems difficult to conceive it without ascribing to it a reference to that object) has received the general name of *fraud*. When, for the conveyance of the false conception, language is employed,—mendacity is the term more likely to be used: when deportment,—fraud.

4. When the mendacity, the fraud, has for its subject-matter the person of any determinate individual; consisting in the endeavour to cause one person to be taken for another; it has in English obtained the name of *personation*. Or if the substantive *personation* be not as yet in common use at any rate its conjugate, the verb *to personate*, is in familiar, as well as in legal, use. Mendacity in this form is, under English law, subjected to capital punishment, and thus put upon a level with what is regarded as the most criminal modification of *forgery*, and above the level of *perjury*, to whatsoever purpose applied.

5. When the deceit has for its object the obtaining the possession of some material object, in relation to which the

quently undistinguishable the boundary, between the functions of sense and that of the judgment—between perception (with its consequent recollection) and inference.\* In another book, manifold occasion, in like manner, will present itself, for observing the same sort of connection between direct and circumstantial evidence. Where a man speaks from simple perception, without the necessity of having recourse to inference, the testimony he gives is purely direct evidence: in so far as what he says is grounded on inference, though it be on inference drawn from his own perceptions—grounded on inference, and seen by others to be so,—his testimony, with whatever propriety it may be ranked under the head of direct evidence, cannot but be seen to involve in it a proportionable mass of circumstantial evidence.

On the other hand, intimate as this connection is between perception and inference in some cases, in others it may be remote to every

person guilty of the deceit is conscious of his having no legal title; it constitutes a particular species of offence against property, and may be termed *fraudulent obtainment*.

To the designation of this species of offence, under the Roman law, the single-worded appellation *stellionatus* is applied in some cases. In English law, it is no otherwise designated than by the circumlocutory expression, “obtaining by false pretences:” except in some particular cases, in which it is familiarly called *swindling*.

In none of the above cases will the names respectively designative of the several modifications of delinquency be employed, unless the falsehood is understood to be accompanied by that blameworthy consciousness which stamps upon it the character of *mendacity*: to the case of falsehood through temerity they will not be understood to reach.

\* Book I, Chapter 8.

imaginable degree of remoteness: and instances may be found in abundance in which it will be universally recognised, that from the erroneousness of the inference, howsoever ascertained, no such imputation as that of mendacity (in other words, of a thorough consciousness, on the part of the witness, of the non-existence of the fact, the existence of which is represented by his testimony as having been inferred by him) can justly attach.

After this explanation, and subject to the limitations brought to view by it, the following propositions will be found to be true, with a degree of correctness sufficient to enable them to be employed to good account in practice.

1. In a case which is clearly that of mendacity, the testimony consists of pretended recollections of pretended perceptions which never did take place.

2. Of falsehood through temerity, one case is that, where,—from a recollection of certain facts (call them evidentiary facts) actually made known to the witness by perception, by the evidence of his senses,—he avers the existence of other facts, (call them principal facts); grounding his persuasion of the existence of these principal facts, on inferences of his own, drawn from these evidentiary facts; which principal facts, and consequently the inference on which his persuasion of their existence was grounded, prove to be untrue.

3. Another case of falsehood through temerity is that, where the persuasion entertained or professed to be entertained by the witness, is grounded, or purports or professes to be grounded, on the relation of some other person

or persons ; which relation turns out not to be true.\*

Observe, that,—though inference, the work of the judgment, is the proper field for temerity, the sort of operation in which the representation of falsehood is most apt to have been the result of mere temerity (*i. e.* of insufficient attention), and to have stood altogether clear of mendacity,—yet neither is this case less susceptible of mendacity than the first. From the fact of my having seen Titius aim a blow at Sempronius, of whose death he stands accused, I may have deposed to the fact of Sempronius's having received the blow; (representing the matter as if, in my judgment, consideration being had of their relative positions, it was impossible that the hand of Titius, moving in the direction in which I saw it move, should have failed of lighting upon Sempronius); whereas in fact I was in my own judgment persuaded that the blow did not take effect; no such inference being really drawn by me, as must have been, had it really been my persuasion that the blow took place.

Again, from the fact of my having heard Sempronius say that he was so struck by Titius, I may have alleged the existence of a persuasion on my part of his having been so struck: whereas in truth it may have been,

\* This case might have been comprised under the second head; inasmuch as persuasion, grounded on the testimony of another person, is necessarily matter of inference. But the two cases, that of inference from a man's own perceptions, and that of inference from exterior human testimony, are, in respect of the opening for error, so widely different, that the latter could not but be referred to a separate head.

either that Sempronius never told me any such thing; or, that, though he told me so, I did not believe him, but on the contrary in my own mind was fully persuaded that what he so said to me was false: as, if, for the purpose of giving a colour of truth to a knowingly and wilfully false deposition on my part, I had myself suggested to him the telling me a false story, invented by myself for that very purpose.

In a word, two sorts of occurrences there are, of which by personal experience no man living but must have been abundantly conscious: one is, the having believed, on the ground of an inference from other facts, the existence of a fact, which, without any imputation upon his attentiveness, or even his sagacity, turned out not to be true: the other is, the having believed also, on the ground of inference, a fact which turned out not to be true, and to which, had he applied his attention with the utmost degree of closeness with which, on some occasions, it has been applied, he would not have given credence. Supposing him to have deposed according to such his belief; the first is a case of falsehood in the way of simple incorrectness without temerity; the other is a case of falsehood accompanied with temerity.\*

\* It is only in consideration of the *purpose*, the mischievous purpose, to which the falsehood is applied, the mischievous *effect* of which it is, or tends to be, productive, that punishment can properly be employed to check it. In respect of quality as well as quantity, the demand for punishment will of course vary with the nature of the mischief, and consequently with the occasion on which it is produced or liable to be produced. To the modifications of falsehood already brought to view, will therefore come here to be added a view of those which result from the particular occa-

In the sketch about to be given of the arrangements made by existing institutions, in

sion on which it is uttered : the general description of the occasion being that of a suit at law either actually instituted or in contemplation to be instituted.

**Distinction I.—Falsehood in penali** (*i. e.* on the occasion of a penal suit)—falsehood in *non-penali*.

### II. Distinctions of falsehood in *penali*.

**Distinction 1.—Falsehood inculpative** (including *criminal*) and falsehood *exculpative*.

**Distinction 2.—Inculpative**, distinguished into inculpative at large, and self-inculpative; the latter conceivable, but altogether improbable and rare; yet not so rare as to be altogether without example. For, in human nature, where is the conceivable inconsistency and extravagance of which examples are not to be found?

**Distinction 3.—Exculpative falsehood**, distinguished in like manner into exculpative falsehood at large, and self-exculpative; both but too natural; both unhappily but too frequent.

**Distinction 4.—Distinction of falsehood**, as well *exculpative* as *inculpative*, according to the division of the offences, with reference to which it may respectively be productive of those effects. Distinction of offences, in the first place, into private, self-regarding, semi-public, and public offences; and so on through the orders and genera of those several classes. For those ulterior divisions reference may fortunately be made to another work.\*

### III.—Distinctions of falsehood in *non-penali*.

**Distinction 1. Collative**, or say *investitive*, (with reference to the right in question), and *ablative*, or say *divestitive*.

**Distinction 2. Onerative**, or say *impositive*, (with reference to the obligation in question), and *exonerative*.†

**Distinction 3. Falsehood collative** (or say *investitive*),

\* Dumont's "Traité de Legislation." See also Bentham's "Introduction to Morals and Legislation."

† A right can never be conferred on one party, but a correspondent obligation is imposed upon another. A right being a thing beneficial in its own nature, and indeed incapable of being otherwise, no mischief can result from its being conferred on one party, otherwise than in virtue of the correspondent and inseparably concomitant obligation imposed by the same operation on some other party.

relation to judicial falsehood and its three modifications as above distinguished, there is one circumstance, which, if it were not noticed at the outset, would be apt to encounter and embarrass us at every turn.

This is the non-employment of any such word as *mendacity* on these occasions, and the practice of substituting to it, where anything at all is substituted to it, the word *perjury*.

One operation there is, and that an indispensable one, by which mendacity is converted into perjury: and that is, the previous connection established between the act of giving testimony and the ceremony of an oath.

What is evident enough, as soon as noticed, is, that, between this ceremony (how great soever may be its use) and the mischief of the act, the act of mendacious testimony, which it is employed to prevent, there is not the smallest natural connection. The mischief exists, exists in all its force, independently of the oath; and it is with the view of helping to prevent that mischief, that the ceremony is employed.

To the applying of legal punishment (and that in a lot as well assorted to the species of delinquency in question as the lots of punishment are that are applied to the respective species of delinquency in other cases), the previous performance of this ceremony, how beneficial soever it may be, is by no means necessary. To the punishing of Testis for a false and mendacious

ablative (or say divestitive), onerative (or say impositive), and exonerative, *at large*;—falsehood self-investitive, or self-exonerative, as before.

Falsehood self-divestitive and self-onerative, possible, but not natural or frequent.

deposition of his, the consequence of which has been loss of life to Insom, it is (setting aside institution and custom) no more necessary that Testis should have taken an oath not to put his testimony purposely in a false shape, than, for punishing him in the case of his producing the same disastrous effect by his own hand, it was necessary to have made him take an oath, promising to abstain from employing that other member in the commission of the same crime.

Yet so it is, that, with a very few exceptions, in the practice of nations, judicial mendacity, mendacity on a judicial occasion or for a judicial purpose, is scarce ever punished, but in the case where, by means of this collateral and casual additament, it has been previously converted into perjury.

The consequences of this state of things have been, in no small degree, and in no small variety of ways, prejudicial to the interests of truth and justice.

1. All the mischief, all the guilt, all the demand for punishment, really attached to mendacity, having thus been transferred in idea to the case in which, by positive institution, it may happen to have been converted into perjury; the demand for punishment and for infamy (the punishment of the popular sanction) having thus been transferred from the right ground to a wrong one; the consequence has been, that where there has been no perjury (that is, where there has been no oath) there has been,—in the conception of the bulk of mankind, and even of their rulers,—comparatively speaking, no harm done: no harm at least of such sort and degree to create any demand for punishment.

First inconvenience from the misnomer—*punishment for mendacity*, and, in that respect, security for veracity, *not co-extensive with the demand*.

The mischief would not have been so great, if, on every occasion on which mendacity of this description were capable of being committed, care were taken to convert it into perjury. But there exists as yet perhaps no country, in which such care has actually been taken. To take it, would have required, in every country, on the part of the sovereign and his assistants, a commanding view of the ends of justice, and of the means most suitable to their accomplishment.

2. Of the thus resting, in this case, the demand for punishment upon a wrong *ground*, another evil consequence has been the applying to it a wrong *measure*. The ceremony necessary to the commission of perjury being in all cases the same ceremony; the profanation of it, by the utterance of the falsehood which it had been employed to prevent, has been regarded, in every instance, as one and the same sort of offence: whereas the real mischievousness of it, the real demand for punishment on all scores taken together, varies in effect from almost the top to almost the bottom of the scale.

Second inconvenience—*quantum of punishment not proportioned to the demand*.

3. A third bad consequence is, that, in several instances, where the legislator has not forgotten to make such provision for the punishment of mendacity as was to be made for it by that collateral and imperfect operation, his provision has been rendered ineffectual by an unlooked-for circumstance. To the punishment of a man in

the character of a witness as for perjury, it is necessary that he should have performed his part in the ceremony of an oath. But the ceremony being understood to be a religious ceremony, sects of religionists have started up, who, actuated by religious motives, have refused to bear their parts in this ceremony. What was to be done? To render these sectaries punishable without the ceremony, as they would have been in consequence of the ceremony, would have been to depart from custom, the ordinary substitute to reason: to attempt to force them into the ceremony, would have been persecution, and, in that respect, against custom, and against reason too. What then was the result? To sit still and do nothing; to deprive the public of the benefit of their testimony; to put them, and those in their company, out of the protection of the law: to leave open in so far the door of impunity to all injustice and all crimes.

Third inconvenience—*exclusion of the testimony of all who are unwilling to go through the ceremony of an oath.*

Besides the mischief to the public, from this same source results no small degree of embarrassment to the writer, who, by the view of that mischief, is excited to apply his industry to the correction of it. Speak of it as flowing from the perjury, the impression you convey is erroneous and deceptitious: you must therefore either discard the word altogether, or give warning of the error every time the word comes to be employed. This appellation, therefore, this improper and deceitful appellation, must at any rate be discarded: another appellation,

mendacity, the only appellation by which it is possible to avoid deception and confusion, must be employed in the room of it. At the same time, the appellation thus unavoidably discarded, is the one, and the only one, which the public is at all in the habit of seeing employed : it is the one which they will be upon the look-out for at every turn : and not finding it, every thing they meet with on the subject will be apt to seem defective and irrelevant.

Moreover, the appellation which they find instead, is one which they are altogether out of the habit of seeing employed to this purpose : they will misconceive, they will undervalue, the force of it : they will wonder, and fancy they see error and injustice, when they see the guilt and punishment of perjury ascribed to a species of misbehaviour which, to their eyes, may present itself as no more than a naughty schoolboy's trick, a venial peccadillo : while, on the other hand, when, to express the misconduct of men in power, as well as of men subject to power, they observe no other appellation employed than one, which, in their experience, has never been employed to characterize any species of misconduct so high in the scale as even the lowest punishable offence ; they will be apt to slight, as scarce worth regarding, what with due attention would be found to be a national disgrace, and a mischievous and most crying grievance.

To give warning, then, once for all—let the following indisputable, howsoever unwelcome truths, never be out of mind with the reader of these pages. By *mendacity*, as often as the word presents itself to his view, let him under-

stand that species of misbehaviour, which, if the legislator had done his duty, would have been to be characterised by the word perjury: and in so far as, by the design or negligence of any special person, the practice of mendacity in law proceedings has, for want of such restraint, been left in possession of the profit aimed at by it,—the guilt of such person wants nothing of subornation of perjury, but the punishment and the name.

## SECTION II.—*Rules for the application of punishment to testimonial falsehood.*

**Rule 1.**—Punishment, employed as a check to falsehood, should attach throughout upon *temerity*, as well as upon *mendacity*: diminishing only in degree, in proportion to the diminution of the demand, produced by the difference between the two cases.

**Reason 1.**—Wherever, in the case of mendacity, mischief is among the consequences of falsehood, so is it in that of temerity. In degree, indeed, it is throughout inferior in this latter case: \* but such inferiority is a reason, not for withholding punishment altogether, but only for reducing it in degree.

The distinction between criminative consciousness, temerity, and delinquency clear off both those aggravating accompaniments, is a distinction that runs through the whole system of offences. In every instance, the mischievous consequences of the delinquency, and in par-

\* Dumont, "Traité de Legislation."—"Introduction to Morals and Legislation."

ticular the mischief of the second order—the danger and alarm\*—are either constituted or increased by temerity, in how much less soever a degree than by criminal consciousness. But by falsehood, in one way or other, may be produced, as will presently be shewn, mischief in all sorts of shapes—the mischiefs respectively producible by all sorts of offences.

Reason 2.—If temerity be not taken as a distinct ground for punishment, distinct from that of *mendacity* (the only species of falsehood convertible into *perjury*) ; in that case, in every instance of falsehood accompanied with temerity, but not with that complete self-consciousness which is necessary to denominate it mendacity, the consequence is, either absolute impunity, or punishment as for mendacity ; that is, if converted into perjury, as for perjury ; and thence punishment in excess.

It has already been remarked that one of the most common cases of temerity is that in which incorrect inferences are drawn from real perceptions : in which, from one fact which did happen, the existence of another fact which did not happen, is inferred.

As the closeness of connection, real and apparent, between fact and fact, is susceptible of variation *ad infinitum* ; so is the degree of the temerity imputable to a man, in the case where, the first being true and the others not, he has notwithstanding asserted the existence of the second, inferring the existence of it from that of the first. The more palpably remote the

\* Dumont, ut supra. “Introduction,” &c. ut supra.

connection is in the eyes of those to whom it belongs to judge, the less in that case will they be disposed to look upon the pretended error as sincere, to regard the false representation as having had temerity and not mendacity for its accompaniment. But suppose the temerity, the culpable want of attention, to have risen to such a pitch as in its effects on testimony to be undistinguishable from mendacity; the quantity of force necessary to be employed in the two cases in the way of punishment for the prevention of it, may also be undistinguishable: and thus it is, that, while for mendacity the lowest lot of punishment may be fixed at a considerable height on the scale,—in the first place it would leave a wide and mischievous door to falsehood, if temerity were left altogether without punishment; and in the next place, the punishment for it ought to be made susceptible of all manner of gradations, from the lowest punishment for perjury, or even above, down to 0.

For fixing the attention of man to whatever happens to be his duty, punishment may be no less necessary than to any other purpose to which it has been employed. Were it not for this, a nurse might with impunity starve her child, a jailor his prisoner, saying, and perhaps with truth, *I never thought about it*: and so with regard to the payment of taxes, and all manner of other active duties.

In particular, in regard to the attention necessary to preserve a man from giving, without actual mendacity, falsehood for truth; if the want of such attention were generally known to be sufficient to secure a man against punish-

ment, he would take care to clear himself of so inconvenient an incumbrance, as often as the falsehood, which it should have prevented, held out a prospect of answering any profitable purpose. Where is the profitable absurdity so gross, that men have not professed, do not profess (and in many instances doubtless without mendacity) to believe? Is there any imaginable absurdity so enormous and so gross, that, for the sake of money, or rank, or power, or a mixture of all these, the bulk of mankind are not at all times ready (and, doubtless, in a large proportion, without downright mendacity) to profess themselves to believe? And in these cases how is it that they keep clear of mendacity, when so it is that they do keep clear of it? By fastening their attention, with all their might, to whatever arguments can be found in favour of the object of belief, and by suffering it, with all their negligence, to be put aside by the force of interest, from all arguments that act in opposition to that object.

*Rule 2.*—On this occasion, as well as on every other; punishment—the punishment provided by the legislator—ought to be such as shall appear to him to be of itself adequate to the purpose, without any assistance from either the popular or the religious sanction.

Why? Because the punishment appointed by the legislator himself, is such as he thinks fit it should be: it is pointed at such objects, and adjusted, moreover, in such quantity and quality, as to adapt it in every respect to the purposes he has in view. On neither of the two other sanctions, powerful and useful as

their assistance will be to him, can he in any of these respects place any such entire dependance.

The instances are but too many in which falsehood, and even perjury, have, and even by the highest authorities, and on the part of official men, been held up to view as meritorious.\*

*Rule 3.*—In determining the quantity and quality of the punishment applicable to this offence in each case, regard must be had to the nature of the mischief of which it is productive.

In respect of the mischief producible by it, (viz. by means of the deception, and thence of the misdecision, of which it may happen to be productive), the field of its influence is nearly co-extensive with the whole field over which *wrong* has it in its power to range.

Exercising itself within the non-penal branch of the field of law, and to the prejudice of the plaintiff's side of the cause, it may have the effect of depriving a man of every kind of right, of satisfaction for every imaginable species of wrong.

Exercised in the same branch to the prejudice of the defendant's side, it may have the effect of imposing on him unduly the obligation corresponding to every kind of right, which, at his charge, is capable of being conferred on a plaintiff.

Exercising itself in the penal branch of the field of law, and to the prejudice of the plaintiff's side of the cause, it may give impunity to the delinquent of any and every description,

\* See Book I. Chapter 11. Section 5.

and by that means be productive of alarm and danger, in any shape, and to any amount, to determinate individuals; to a determinate class of persons; to the community at large.

Exercising itself in the same (viz. the penal) branch of the same field, and to the prejudice of the defendant's side of the cause, it may have the effect of subjecting an individual altogether innocent, to any article or mass of punishment which has been, or can be, inflicted under the authority of the law.

The mischiefs, therefore, producible by false testimony considered as an eventual cause of deception, and thence of misdecision, on the part of the judge, are, in this view of them, as numerous and as various as the mischiefs producible by misdecision itself.

Neither in the way of punishment, nor in any other way, is there any mischief, which, being producible by the exercise of judicial authority, is not producible by judicial falsehood.

The mischief being thus diversified and extensive, the application of the punishment destined to serve as a security against this mischief ought to be correspondently extensive and diversifiable.

No reason can be given why a wrong,—which is followed by satisfaction, or punishment, or both, if committed by any other means,—should go without satisfaction, or without punishment, if committed in this way by a guilty pen or tongue. By either of these instruments, destitute as they are of physical strength, life may be as effectually destroyed as by the cannon or the sword.

To attempt to fix, either in point of quantity

or quality, the mode of punishment best assorting to each modification of delinquency thus commissible, belongs not to a design so limited as the present. Principles destined to both purposes are already before the public in two other works.\*

One hint only in respect of quantity.

The alarm inspired by mischief arising from this species of fraud,—from a fraud which, like this, has for its theatre the theatre of justice,—seems to be not altogether so great as that which springs from a fraud operating upon a more private theatre. In the case of swindling, for example, a man beholds for himself no other security than in his own, perhaps unexperienced, sagacity and discernment: in the case of testimonial mendacity, no otherwis[e] commissible than in so public a theatre as that of a court of judicature, he beholds for his security, besides the unexperienced sagacity of the jury, the thoroughly exercised sagacity of the advocate and the judge.

One other hint in respect of quality.

A punishment which, in the practice [of] English jurisprudence, stands upon the list [of] those which, on the occasion of testimonial mendacity (when duly erected into perjury) awaits the option of the judge, is the pillory; an instrument devised for the purpose of inflicting the punishment of corporal ignominy. But considered as applied to testimonial mendacity, the pillory has nothing belonging to it that can serve in any respect to point the attention of the observer to the nature of the crime.

\* "Introduction to Morals and Legislation." Dumont,  
"Traité de Legislation."

If, on this occasion, as on others, a proper object be to give to the punishment that species of analogy, or characteristicalness, which is given to it by exhibiting the offending member in a state of sufferance, real or apparent; the offending member is in this case not the neck, with both the hands for company, but the one offending hand (*viz.* the hand that gave motion to the offending pen), or else the offending tongue.

*Rule 4.*—In both shapes, as well that of temerity as that of mendacity, punishment should embrace every case of false statement uttered by any person in the course or for the purpose of judicial investigation: every false statement, at least, from which, in any shape, advantage or inconvenience can accrue to any body. Neither on this occasion nor on any other, should a man be suffered "*to take advantage of his own wrong.*"

*Reason.*—If, in the course of procedure, (or on any other occasion in which pecuniary interest, or, in short, any other species of interest, is at stake), a man is allowed to derive advantage in any shape from false assertions; false assertions may in every such instance be expected from the generality of mankind. In the course of judicial procedure, in particular; if, in the case of any such assertion, nominal as well as virtual, or virtual only, no punishment be either appointed by positive regulation, or commonly applied in practice; the party who sees an advantage to be gained by such falsehood, will look upon it as allowed: and the habit of such falsehood will thus become general, not to say universal, among suitors.

In such case, whatever injustice results from

such falsehood, whether in the shape of direct or in the shape of collateral injustice (vexation, expense, or delay), ought to be set down to the account, not of the party, but of the legislator and the judge.

For any of the differences, the abolition or prevention of which is prescribed by this equalizing rule, no reason ever has been, no sufficient reason ever can be, given. Whatever may be the sanctions, the force of which employs itself, or is employed, in the endeavour to confine men's discourse, for the purposes of justice, within the path of truth,—sanctions of law, sanctions of morality, sanctions of religion,—they are not less necessary on one side of a cause than on the other: on the part of one of the dramatis personæ in the theatre of justice, than on another: on the part of the professional agent, for example, than on the part of the client. In one station, the natural force of the improbity-and-mendacity-restricting motives acting with more power than in another; the demand for factitious power, acting in the same direction, may not perhaps be quite so great. But, be the station what it will—if the power of the mendacity-restraining motives be inferior to that of the mendacity-promoting motives, mendacity is the certain consequence.

That the interests of truth and justice neither require nor admit of any such distinction, is too self-evident to require proof, or to admit of it. Turn to practice, the distinction is exemplified to a prodigious extent. To a prodigious extent spontaneous allegations are, in case of mendacity, exempt from those punishments which attach upon it in the case of allegations ~~er~~

*interrogato*; which would attach upon the same falsehoods, if drawn forth by questions.

The cases in which this license—the *licentia mentiendi*—is granted, are sufficiently indicative, as well of the quality of the authors, as of the final cause of it. *Concessum est oratoribus*, says a famous orator, *aliquid mentiri in historiis*. *Concessum est*—by whom? Such is the license, but who, it may be asked, are the granters? Instead of *oratoribus*, put *litigantibus*, the proposition is at once more determinate, and more unquestionably true. In this case, that the license is granted, and who the granters are, are two points equally and simultaneously conspicuous: nor will the third point—why it is granted—be much less so.

When a cause has run out its length, the man of law has nothing to lose by the punishment of mendacity; on the contrary, he is a gainer by it: the mendacity may afford matter for a fresh cause: and it is in a fresh cause, if at all, that the enquiry is performed; how satisfactorily soever the fact of the offence may have been established in the course of the cause which gave birth to it. Applied at this stage,—whatever it may contribute in regard to the prevention of mendacity in future contingent causes at large,—it contributes little or nothing to the prevention of it in the individual cause in the course of which the falsehood is uttered. If, by punishment, or whatever other means are necessary to the production of the effect, truth were not rendered, to appearance at least, more probable than falsehood in judicial causes, there would be no such causes instituted. Accordingly, at this time of day, punishment is almost

universally applied to persons called witnesses, (meaning extraneous witnesses), as likewise to the litigants themselves, when, with reference to the main point in dispute, they come, either of them, to be examined in the character of witnesses.

This community of interest between the professional lawyer and the public,—between the class of persons by whom law, especially jurisprudential law, is made, and those for whose interest it is supposed to be made,—is, however, by no means co-extensive with the whole extent of the cause: and where it fails or is not taking place, *i. e.* to whatever point the opposition of interests extends, there of course the interest of the governing class governs, and that of the governed is sacrificed to it.

If the truth of the facts on which the commencement of a cause is grounded, were vouched for on the part of the litigant party by whom it is commenced; those which are said to have fallen within his own perception, by a direct deposition on his part,—those in respect of which his persuasion is grounded on circumstantial, or on extraneous testimonial, evidence, by a declaration of persuasion, adapted to the nature of the case; a most extensive description of causes would thus be nipped in the bud: all causes in which the plaintiff, being completely conscious of a total want of merits, was at the same time assured, either of his inability to produce any sufficient proof, (*i. e.* any proof that would be sufficient if it were believed), or of seeing the force of it overborne by counter-proof: or (to come to the point at once) all those in which the loss of the cause would, in case of

mendacity or temerity on his part, subject him, if not to the legal punishment, to the moral shame, of perjury. Here then is a large description of causes,—or rather a large proportion of causes of all descriptions—of which the profit would be lost.

Should it be asked, in what way a man thus circumstanced can find his interest in the institution of any such cause, the answer is but too obvious: every case in which a man, having oppression for his object, beholds, in the person of his intended victim, a person either unable or unwilling to bear the quantity of expense and vexation, which in this case has been attached to the faculty of self-defence. In such case, where the inability is total, or the unwillingness immediate, the profit of the profession is confined to the earliest stage, or first stages, of the cause: if either the one or the other bar to the continuance of the cause does not present itself before a later period, the intermediate stages constitute by so much the longer line, with which the current of profit is co-extensive. As to the *mali fide* plaintiff, (bating the casualty of pecuniary support afforded to the intended victim by the casual generosity and ability of his friends), the relative degrees of opulence being given, the operations of this system of warfare may be reduced to certainty. That, in a siege, how long the power of self-defence may be expected to be protracted, may be known, by means of the proper *data*, if not to a day, at least to a week, is a point that seems to be sufficiently settled by the general opinion of the professors of that branch of the art military. But in the judicial warfare, at what expense a

man perfectly honest and completely innocent and irreproachable, may be either enslaved or ruined by a villain—any villain whatsoever, who happens to be in a certain degree richer than himself,—is a result the certainty of which, under the system of policy in question, is not at all affected by the uncertainty which, to the prejudice of him who has right on his side, is but too well known to be attached to the operations of the law. The prospect of obtaining redress in any degree is deplorably uncertain: the prospect of obtaining complete redress is, with few exceptions indeed, altogether hopeless: the prospect of oppressing with impunity may be reduced, and every day is reduced, to a complete certainty.

Uttered on a judicial occasion or for a judicial purpose, spontaneous statement will, according to the usage of established language, —, be understood to require a different appellation, —, according as it is in the character of a witness or —, in that of a party that the person is understood — to express himself: if in the character of a — a witness, whether extraneous or self-regarding, —, *deposition*: if in the character of a party merely, —, and not in that of a witness, *allegation*. From —, *depositions*, the license for mendacity has been, —, in general, taken away: to *allegations*, it has —, been, in general, extended: and if, in here — and there an instance, it has at different times — been withdrawn,—the proposition by which the existence of it has been affirmed, continues still to constitute the general rule: nor can the reasonableness and experienced utility of the exceptions be maintained by any arguments, which will not, with equal force, evince the

mischiefousness and depravity of the general rule.

In the character of a witness, or of a party under examination in the place of a witness, a man must take care what he says ; he is expected to confine his discourse within the pale of truth : but no sooner is he freed from the encumbrance, than all restraints of legal obligation are thrown off along with it ; the word of command is, *stand at your ease* : the field of mendacity is thrown open to him, and in that field he beholds a play-ground, in which fancy and sinister interest are allowed to gambol without restraint.

Depositions and allegations—depositions on the one side, allegations on the other,—differ in name ; by positive institution, as above, they differ in effect : but, after making due allowance for the slight distinction in nature which gave rise to the difference in name, there is no reason why the one, more than the other, should be exempt from the law of truth. In both cases, the immediate subject of the assertion is the existence of a fact—a psychological fact : in both cases, it is the existence of the same fact ; viz. a persuasion concerning the existence of some other fact. In the case of a deposition, where the evidence is strictly and purely direct, without mixture of circumstantial,—the fact constituting the subject of persuasion is the recollection of certain perceptions entertained by the deponent himself, at a point of time more or less remote. In the case of a deposition which explicitly or implicitly involves a mixture of circumstantial evidence,—the fact constituting the subject of persuasion consists, *pro*

*tanto*, of certain inferences drawn from certain perceptions, so entertained, as above. Where the fact which is the externally apparent subject of the allegation, is a fact, the persuasion of which never had the immediate perceptions of the person in question for its ground,—that persuasion has a different ground to rest upon; but, on the part of a veracious speaker, its existence is not less indisputable, in this case, than in the other: nor is the assertion of its existence less susceptible of mendacity in this case than in the other.

A horse belonging to the defendant has broken into my enclosed field, and damaged my growing corn: deposition or allegation, this at any rate is an assertion on my part; an assertion, by which the existence of a persuasion on my part (a persuasion of the past existence of an individual fact belonging to the species of facts designated by these words) is expressed. If this persuasion has for its ground the recollection of a correspondent perception on my part, viz. the sight of the horse when occupied in the act of treading down the corn, and feeding upon it; and if, at the same time, by the terms by which such assertion is conveyed, I declare it to have had such perception for its ground; my assertion is of the nature of a deposition, and is properly susceptible of that name. If I speak of the same fact as a fact which I look upon as proved, or capable of being proved, by my own testimony; although the fact which presented itself to my senses was not the very fact so described as above, but an evidentiary fact, or assemblage of evidentiary facts (which on account of their

supposed necessary connection with that principal fact, produce on my part a persuasion no less satisfactory of its existence) say, for example, my having seen the horse running in a line leading from the field, and in a part of that line commencing immediately without a hedge that bounds the field, the hedge being broken behind, and footsteps tallying with those of the beast discernible on each side of the hedge; in this case my assertion is not less susceptible than in the former, of presenting itself in the character of a deposition.

If, on the other hand, my persuasion is spoken of by me as not having had any such perception of my own for its ground; neither the perception of the principal fact itself, nor the perception of any physical fact operating on my mind, in relation to it, in the character of an evidentiary fact; but the existence of a set of perceptions of either of the above descriptions on the part of a third person, Titius;—then, and in such case, my assertion cannot, according to the notions and language of jurisprudence, bear with propriety the name of a deposition (except in so far as hearsay evidence is received in depositions): of the two names in question, it cannot with propriety bear any other than that of an *allegation*: the deposition, if there be any, must be the work of Titius. But whether the assertion, by which the existence of the principal fact in question is pronounced—the fact on which I ground my claim of satisfaction—the fact which, with reference to my title to such satisfaction, I rely on, in the character of an investitive or collative event; whether such my assertion be of the nature of

a deposition, or in the nature of a bare allegation; it is equally expressive of a persuasion: and the declaration of the existence of that persuasion is equally susceptible of truth and falsehood, of veracity, mendacity, and temerity; and the fact of such mendacity or temerity, where it exists (though it be an internal psychological fact, the seat of which is in my mind) is, like so many other facts of that same nature, equally susceptible of proof—of proof of a texture strong enough to afford a ground for the burthen of satisfaction, or for the burthen of punishment.

A declaration assertive of such persuasion, and that (in case of its being knowingly false) on pain as for mendacity, may therefore with equal propriety be insisted on in the case of a party, as in the case of an extraneous witness.

There remains, as capable of being included in the allegation, the point of law: the proposition expressive of a man's persuasion in regard to the state and condition of the law, so far as respects the subject-matter of his claim.

The reality of the distinction between mendacity and temerity, and the necessity of preserving it (viz. for the sake of avoiding the mischief of applying excessive punishment on one hand, or giving impunity to delinquency on the other) have been already brought to view. Of the two points, the point of fact and the point of law, the latter is the one in relation to which temerity (in contradistinction to mendacity) is most apt to be the accompaniment of erroneous assertion. In regard to matter of fact, persuasion may be the mere copy of perception, the simple result of recollection: in re-

gard to matter of law, it can never be produced without the aid of judgment and inference.

In a general view, the uncertainty of the law is a quality, unhappily, but too strongly stamped upon it, even in those countries in which the mischief is least flagrant: and, upon a view thus general and indiscriminating, it may naturally enough seem a harsh arrangement to fix upon an alleged persuasion (how erroneous and groundless soever) the imputation of mendacity, or even of temerity: at least if followed up by inflictions of a penal or otherwise burthensome nature, in practice.

Unquestionably, the points in which the aspect of the law may appear uncertain, and that even to the most penetrating eyes, are in every system of established law but too numerous: but this partial uncertainty does not hinder but that, in respect of the subject-matter of this or that individual suit, the state of the law may have been much too clear to admit of any possibility, psychologically speaking, of its having been mistaken. No man who, upon a moment's search directed to that view, will not meet with objects of property in plenty, to which he will be satisfied that, at the existing point of time, be it what it may, he cannot, under the existing state of the law of his country, be it what it will, possess the least shadow of a claim; insomuch that, if, in relation to any such object, he were upon oath to declare, on his own part, the existence of a persuasion pronouncing that object to be included by law in the mass of his property, such declaration could not but in his own mind be accompanied with a consciousness of

the guilt of perjury. Well then, let him, for the purpose of the argument, fix upon any one or more of all that infinite variety of objects : let him, if he pleases, include in the list the contents of the firmament and the host of heaven. If the commencement of a suit at law, for the recovery of an object of property, be understood as involving a declaration of a man's persuasion, affirming on his part the existence of a right to that object as given him by the dispensations of existing law ; a declaration to that effect, under most, if not all, systems of established law, may, in relation to any such object, or number of such objects, be uttered by any man that pleases, without exposing himself to any sort of punishment,—or to any worse consequences than what would ensue from the disallowance of a claim, of the legality of which, a man of the soundest judgment and most intimate acquaintance with the state of the existing body of the laws, might, with ever so clear a sincerity, declare himself persuaded.

Falsehood—false declaration of opinion, accompanied with mendacity ; error, declaration of an opinion really entertained but erroneous, accompanied with temerity ; error, declaration of an opinion really entertained but erroneous, unaccompanied with temerity : such, in regard to the subject in question, are the broad lines of difference. Of these different states and aspects of the mind, there is not one that is not frequently, the two first but too frequently, exemplified in practice. Of these several facts, all of them of a psychological nature, there is not any one of which those

whom it belongs to judge of legal facts are not as competent judges, as capable of framing a well and sufficiently grounded judgment, as of any other fact belonging to the class of psychological facts. Even of mendacity, of perjury, in these cases, the existence, as already shewn, is by no means incapable of being pronounced, and on perfectly sufficient grounds. If even of perjury, much more of temerity: of which,—inasmuch as, (considered in the character of a species of delinquency) the number of degrees and shades of which it is susceptible is infinite, reckoning from perjury down to absolutely blameless error,—so accordingly may be the corresponding shades and degrees of punishment.

In the case of theft, no man is ever convicted of that crime, unless the judge (in English law, the jury) be as fully satisfied in regard to his persuasion concerning the question of law, as, in case of a conviction of perjury, they are in regard to his persuasion concerning the matter of fact. Let it be ever so clear, that the thing supposed to be stolen has been taken by him; still, if there appear to be any degree of probability, how slight soever, that he regarded it as being his own by law, he is no more convicted of theft than if he had never meddled with it.

Suppose it a case in which the suitor has no professional adviser (for in no country is the case absolutely without example): it is upon the suitor, and upon him alone that, in the case of the offence in question, whether it be temerity or mendacity, the imputation must attach; together with whatever penal or other

burthenous consequences may have been annexed to it. But if, in the case of an individual taken at large,—an individual taken from the most numerous, which are necessarily the least informed, ranks in life,—error thus accompanied, may, without oppression or injustice, be taken as a ground for punishment; much more may it in the case of a man by whom the sort of knowledge in question is professed, and whose title to the remuneration he receives, is grounded on the possession he professes to have of that knowledge. So far as facts are concerned, it may have happened to him to be deceived by his client: though, in regard to any declarations made by him on that subject, even on that occasion recurs the question as between mendacity, temerity, and blameless mispersuasion. But, so far as the question of law is concerned, the blame (if any blame there be) must press upon him, in full and undiminished force: and as to the difference between fact and law, if there be any occasions or purposes for which it is determinable, this is one of them. In the case of the ignorant, the irreproachably ignorant, day-labourer or mechanic, to whom any tolerably adequate acquaintance of the law has been rendered impossible,—ignorance (according to a maxim generally maintained and acted upon by those by whom the impossibility of knowledge has been created) is no excuse: shall it in their favour alone be an excuse, who profess, and who in so peculiarly abundant a degree are paid for professing, peculiar, and even exclusive science?

The surgeon, or even the farrier, who does

injury to his patient, for want of the scientific skill, the possession of which he undertakes for (though it be but by the assumption of that professional name), is, for compensation to the party injured, taxed by them without scruple; and not without reason, even though it be without the least suspicion of his having intended injury. The man of law,—although on his part the intention, the consciousness of injury, be out of doubt,—shall he alone be exempt from that responsibility which by his own arrangements has been made to attach upon comparative innocence?

The more clearly the question of law, with all declarations of opinion respecting it, is separated from the question of fact, with the corresponding declarations; the easier of course will it be, in the station of the judge, to determine as between mendacity, temerity, and blameless error, and to act accordingly. Turn to established systems, we shall see the two questions lumped together, not to say confounded, by one and the same expression; and punishment, as for perjury, attached to mendacity—to mendacity, and on whose part?—on the part of the suitor, and him only; not in any case on the part of his professional adviser, the man of law.

So much for the rules themselves, and the reasons on which they are grounded. In the remaining sections of this chapter, the light of exemplification will be thrown upon them, by the instances in which they have failed of receiving due observance from established practice. All-comprehensive in their extent, the practical importance of them will be found proportionable.

**SECTION III.—*Defects of Roman law, in regard to the punishment of testimonial falsehood.***

Under the ancient Roman law, (if Heineccius's account of it is to be depended upon) falsehood, mendacious falsehood,—though punished on a variety of extra-judicial occasions, mostly bringing it under the denomination of fraud,—yet, when committed on a judicial occasion, in the shape of mendacious testimony, was in general exempt from all legal punishment. One exception is noted, and but one: viz. when, being in the shape of criminative perjury, it had the effect of murder: in this case, it was, with a consistency not yet attained by English law, punished as murder: murder thus committed by the tongue, was punished as it would have been if committed with any other instrument.

In other cases, *calumny* appears to have been treated on the footing of a punishable offence; and punished as such, sometimes with pecuniary punishment, at other times with the complex and heterogeneous punishment expressed by the name of *infamy*.\* By calumny, appears to have been meant false testimony, when given on the criminative side. Committed on the exculpative side in penal cases, and on either side in cases not penal, mendacity would hardly be understood to come under the name of calumny: in those cases, therefore, it should seem, no punishment would attach to it.

As to perjury; in the ordinary course of judicial testimony, and on the part of an extraneous

\* Halifax, p. 104.

witness, it could not be committed :—why ? because, in that case, the act of deposition was not accompanied by the ceremony of an oath : by that ceremony by which mendacity is converted into perjury. The only cases in which the ceremony of an oath was employed in judicature, were those in which the witness was a self-regarding witness—the testimony was of the self-regarding kind : and then, to complete the absurdity, it was rendered incontrovertible and conclusive.\*

Once upon a time, indeed, it is said that a gang of false witnesses were thrown from the Tarpeian rock : to judge from what is said of them, one must suppose that, in some way or other, they had entitled themselves to the name of *perjurors*. Be this at it may, the misadventure seems to belong to the head of casualties at large, rather than to that of legal executions : it is noticed, by a collector of anecdotes, as a thing that *had* taken place ; not by a legislator, as a thing that, according to the determination of him, the legislator, was in future to take place.

Till the Roman empire was far gone in its decline,—that justice should have truth rather than falsehood for its foundation, was a point not thought worth providing for : always excepting the narrow cases above described, in which falsehood, being preceded by an oath, as well as accompanied by mendacity, received the name of perjury. By the joint tenants of the Roman empire, Arcadius and Honorius, perjurors, we are told, were threatened with in-

\* Vide infra, Chapter 6, Section 5.

famy: but if it had been made possible for us to know whether any, and what, false witnesses, were on this occasion included under the name of *perjurers*; or what was meant by *threatening*, i.e. whether the legislator actually made a law to such effect, or only threatened to make one; or what sort of a punishment the *infamy* was that the delinquents in question were threatened with; neither would the law have been Roman law, nor Heineccius the expositor of it.

Perjury itself (whatever was meant by perjury) does not seem to have been treated as a punishable crime, except in the particular case where, the avenging deity being the *genius of the emperor* (whatever was meant by the *genius of the emperor*), perjury, in this case, was consequently a species of high treason, or rather a sort of compound of high treason and blasphemy, and consequently could not be too severely punished. Not applying in general to testimonial, commonly called assertory, oath, its application must have been confined for the most part to promissory oaths.

Quitting the masters, we must now apply to the scholars: on this, as on other occasions, let us apply to the head scholars in preference: to the French, as being the most enlightened as well as the most numerous nation of continental Europe.

Among these modern Romanists, at any rate, mendacity, in so far as it has happened to have been previously converted into perjury, has been punished under that name.\*

\* Code Pénal, p. 160—viz. by imprisonment, with forced labour, on board the galleys.

By these scholars too, as by their masters, homicide committed by means of perjury, has been punished as homicide.\*

Looking at the established course of procedure, under the old French law; on the part of the suitors, as such, falsehood seems to be altogether without a check. No affidavits, as in English judicature, to establish facts for the purpose of introductory or interlocutory decisions. In respect of facts to be established as grounds for the definitive decision, the parties, though interrogated as witnesses, are interrogated upon oath; consequently, in case of proved mendacity, punishable as for perjury. But in respect of assertions made for the purpose of laying a foundation for this or that step, or train of steps, in the track of procedure; ransacking for this purpose a quarto volume of 864 closely-printed pages,† I can see no trace of impending punishment. No oath required or received; every allegation wears the form of a simple affirmation; and cases are mentioned, and that to an undefined extent, in which, though the fact be within the cognizance of the party, the affirmation may be made by proxy, the attorney speaking for his client.‡

In an argument of Linguet's, on the contested marriage of the vicomte de Bombilles, there is a passage which exhibits a faithful enough picture of a cause, as carried on at that time, under the technical system of Romano-Gallic

\* Ibid.

† Ravaut, "Procédure Civile du Palais." Paris, 1788.

‡ Ibid. p. 66.

procedure.\* "En raisonnant, en dénaturant, en falsifiant ainsi les choses, les mots, et les écrits, on réussit à remplir un Plaidoyer ou un Mémoire:...mais le public instruit fait justice."

Where a party is exposed to no punishment, in case of mendacity,—is never subjected to the obligation of giving a word of answer to any question put to him by the adverse party, in the presence of the judge,—has, upon the terms of uttering a lie to this or that effect, a right to continue the series of delays and expenses in one court, or to commence a fresh series in another; if, under such a system, a man, conscious of being in the wrong, suffers the day on which a definitive decision can be pronounced to arrive, he may seek the cause of his defeat in his own ignorance or indolence, rather than in any obstacle opposed to his success, by the discernment, and zeal or activity, of the legislator or the judge.

In most established systems of law, the triple distinction, between delinquency accompanied with self-criminative consciousness,—delinquency accompanied with temerity,—and delinquency clear from both these accompaniments, and therefore free from moral blame,—has obtained more or less notice. On the other hand, in no established system have these important distinctions been clearly conceived and expressed in words, nor therefore applied with any uniformity in practice.

The distinction is in itself applicable, with few or no exceptions, and with equal propriety, to all manner of offences: but it is only in here

\* Linguet's *Plaidoyers*, tom. vi. p. 404.

and there a scattered instance that any such application has been made of it.

To testimonial falsehood it is applicable, with as much propriety as to delinquency in any other shape. But, that in established practice any such application has been made of it, appears by no means probable.

In the Roman law, though self-criminative consciousness has been no otherwise indicated than by the inexpressive and inapposite appellatives of *dolus* and *mala fides*; the distinction is not unfrequently, how far soever from uniformly, brought to view. Accordingly, where *dolus* or *mala fides* is considered as not proved, the absence of it is not always considered as exempting a delinquent completely from all punishment: *culpa*, sometimes stiled temerity, is, in certain cases, understood to create likewise a demand for punishment, in effect at least; if not in name; though to an inferior amount.

To the case of testimonial falsehood, indeed, the distinction could scarcely have extended. If testimonial falsehood were converted by the previous ceremony of an oath into perjury, it was matter of doubt whether among the Romans it was considered as generally punishable, under that name at least, even in the most atrocious cases.\*

On this head the modern Romanists have gone far and usefully beyond their guides, the Romans. By the latter, the distinction between *dolus* and *culpa* appears to have scarcely gone beyond the case of misbehaviour

\* Hein. iii. 31.

relative to contracts,\* with or without the addition of that of homicide.† By the latter, it seems to have received a pretty general application to the higher ranks of offences.

#### SECTION IV.—*Defects of English law, in regard to the punishment of testimonial falsehood.*

The first great defect of the English law, in regard to the punishment of judicial falsehood, is the absolute want even of anything like an approach to a graduated scale of punishments.

Mendacity, when punished at all, being punished not as mendacity, but as perjury ; the profanation of the ceremony being regarded as constituting the principal part, if not the whole, of the guilt ;—that profanation being the same, whatever be the occasion on which, or the purpose for which, the crime is perpetrated, or whatever be its effects when perpetrated ; no distinction is made in the punishment.

Common sense dictates, that, if there be a difference in guilt, and a difference in the demand for punishment, as between him who assaults a man with intent to kill, and him who assaults with only the intent of inflicting a slight bodily pain ; there is at least an equal difference in guilt, an equal difference in the demand for punishment, as between the man who gives false testimony for the purpose of taking away the life of an innocent person, and the man who performs the same act for the purpose of subjecting him to a penalty of five shillings.

Among the Romanists, as has been already

\* Ib. i, 473—ii, 66, 87—iii, 114.

† Ib. vii. 200.

observed, murder, when thus perpetrated by the tongue, was treated nearly as if the same crime had been committed by means of any other instrument.

In English judicature; as, in the case of a poor delinquent, there was nothing to be got for the king by punishing the offence,—no knife, value six pence, or sword, value six shillings, to be forfeited; no murder could in this case be discerned. In later times, propositions have been started for treating murder as murder, when committed by these means: but the difficulty of saying what forfeitable commodity a man could on any such occasion be said to have been holding in his right hand, threw out the innovation, and there the matter rests.\*

But this is not all: in English law no distinction is made between two offences generally so widely different in point of enormity, as falsehood through mendacity, and falsehood through temerity.

In English jurisprudence, the confusion of men's conceptions on this subject is evidenced and perpetuated by the inappropriateness of their language. For the *dolus* of the Romanists, they have sometimes *malice*, sometimes *mala fides*: for the *culpa* of the Romanists, they have nothing at all. *Malice* accordingly means, in some cases, existence of the self-criminative consciousness: but it means a hundred things besides. The short account of the matter is, that, when men of law talk of *malice*, they do not know what they mean: this, though so short an account, differs little, if anything, from the true one.

\* State Trials—Elizabeth Canning's trial.

For discovering what they mean, there is one course to be taken, and but one: and that is, to observe the treatment they give to a delinquent, to whose conduct this feature is ascribed. Malice is either *express* or *implied*. With this distinction at command, if a fancy happens to take you to punish a man as for *malice*, it is impossible for you to be under any difficulty. Whatever you happen to mean by malice, if you can prove it, you prove it: if you cannot prove it, you imply it.

But, though the distinction is neither conceived by them nor expressed,—though, for want of being clearly understood, it is unexpressed, and, for want of being expressed, it is not understood,—it cannot be said to be altogether unfelt: accordingly, so far as discretion in judicature extends, the distinction, in both its branches, may not unreasonably be expected to be seen applied in practice. In general, a man whose delinquency is altogether pure from temerity, as well as self-criminative consciousness, will not, in every instance, be so hardly dealt with—under, or not under, the name of punishment—as a man in whose instance delinquency is accompanied with that cause of blame. A man whose delinquency is characterized by temerity, and nothing worse, will not be punished with so much severity as the delinquent whose conduct shews that a full view of the several circumstances, on which the criminality of the act depends, was all the time before his eyes.

In homicide, for example; although a lawyer, bewildered as well as tied up by precedents, will imply malice, where, in the sense annexed

by everybody to the word *malice*, neither he nor anybody else sees any such thing; although, in support of that implication, he will be urgent with a jury to convict as for murder a man who, through temerity, without either self-criminative consciousness or ordinary malice, has committed an act of homicide; yet in another place, another lawyer, or perhaps the same, will betake himself to the fountain of mercy, and substitute, in such a case, to the punishment insisted on by common law, a punishment suggested by common humanity, with the support of common sense.

In regard to the offence of testimonial falsehood, scarce any, even the obscurest, notion of the distinction in question (I mean, so far as temerity is concerned) appears, as yet, to have found its way into English jurisprudence. In a case of temerity, a man must either be punished as in a case of self-criminative consciousness, or go unpunished. Falsehood, falsehood committed in giving testimony, is either perjury, and punishable as such, or remains without punishment, because it remains without a name;\* and by *perjury* is understood (how inadequately and improperly soever expressed) falsehood not only preceded by the ceremony of an oath, but accompanied, in the mind of the delinquent, with the self-criminative consciousness so often spoken of.

In the case of Elizabeth Canning, a girl under age, who, in 1754, was convicted of perjury at the Old Bailey, for that, on her disappearance

\* Except the case of a Quaker, which applies not to this purpose.

from home for about four weeks, she had sworn to her having been confined during that time, and robbed, in a house of ill fame, by the mistress Mary Wells, and a gipsy woman, then a lodger in the house ; on which evidence of her's, Wells and the gipsy had been capitally convicted ;—a majority of the jury, as well as a bare majority of the judges, had regarded the narrative as false *in toto*, having for its object the saving herself from the imputation of a voluntary residence in company by which, if known, her character would have been destroyed. This consequently was, in their eyes, a case of self-criminative consciousness. But, to a part of the jury, it appeared that the story was false in circumstance only ; and that the falsity was accompanied with nothing worse than temerity, not self-criminative consciousness. That she had been incorrect in her statements, could not be doubted by any one ; since in a variety of circumstances it was not only contradicted by extraneous witnesses, but inconsistent and self-contradictory. Temerity on this account—want of the attention which might have been bestowed, and which, had it been bestowed, would have saved her from the stating of so many particulars, of the falsity of which there could be no doubt—could not but be imputed to her by everybody : since, on the occasion on which they were uttered, the lives of the persons actually convicted on her testimony were at stake. But of her consciousness of the falsity of her own statements (it appears) they were not persuaded : at least as to any of the circumstances essential to the conviction of the persons convicted on her evidence. With this exception, they were sa-

tisfied of her having committed *perjury*: and on that account had joined in the verdict convicting her of the crime so denominated. But, in their conception, the perjury was not wilful and corrupt: the wish declared by them, accordingly, had been, that, in the instrument attesting, the words expressive of that imputation should be omitted.

In the words *wilful* and *corrupt*, we may observe an endeavour to express a circumstance, which, at the time when the locution was first hit upon, the progress of intelligence had not qualified men to express by clear and apposite words. By the word *wilful*, a psychological fact, the seat of which is in the understanding, was referred to the will: *wilful* the assertion could not but be, unless uttered by the perjurer in a state of delirium, or in his sleep. The circumstance meant to be expressed by the word *wilful* was, that the perjurer, at the time of his uttering the assertion in question, was persuaded—was conscious—of its falsity;—of its want of conformity to the truth. The word *corrupt* is a term intensely but vaguely dyslogistic: what it does express, though still in a vague manner, is the quantity,—what it endeavours, though unsuccessfully, to express, is the quality,—of the blame.

In this case, we may observe an occurrence, the exemplification of which is not unfrequent in English judicature: the probity and unsophisticated good sense of the occasional judges (or jury), coming forward with a request, which the scientific intelligence of their professional instructors does not enable them to comply with. We are not satisfied of the existence of self-cri-

minative consciousness ; we are satisfied of the existence of temerity : what we wish is, to give such a verdict as shall subject the defendant to the punishment adapted to that inferior degree of delinquency, but not to the superior. Such was, in substance, the language of these conscientious jurymen. But the established language and practice of the law was not such as to enable the keepers of the *officina justitiae* to satisfy so reasonable a demand. They were forced to leave it unsatisfied ; they had no such articles in their warehouse. If you want law for wilful and corrupt perjury, there it is for you : as to perjury that is not wilful and corrupt, there is no such thing ; no such thing that we know of. Wilful and corrupt perjury is therefore what you must convict the defendant of, or else acquit her altogether.

In the practice of English law (with but a single exception) if any punishment be annexed to the practice of mendacity, the sanction of an oath is employed, as a medium of connection, to attach the punishment to the offence. Mendacity, when the sanction of an oath has been employed as an instrument to bind the conscience of the individual to an adherence to the opposite virtue, is termed perjury. Perjury, accordingly, in these cases, not mendacity, is the denomination given to the offence: insomuch that mendacity, if it fall not within the case of perjury—if it be not punishable as perjury,—is not punishable at all.

The single exception, spoken of above, is constituted by the case of examination taken by the House of Commons, or a committee of the House.

to that, in that legislative tribunal, truth is less importance than in a cause about the value of a pot of beer, or a packet of pins. The helplessness, in this respect, of the most intelligent of the three branches of the legislature, is a great point of constitutional law:—and, according to common intendment), in the judicial branch beyond every other, it belongs to utility to give way to usage.

It yet is mendacity, on these occasions, always exempt from punishment. It is called contempt; and, as such, is punishable with imprisonment; to which, by means of fees exacted by the house for the benefit of the jailor, added pecuniary punishment. With impunity: but mark the consequence!... The imprisonment being limited in its duration by that of the trial which inflicts it, and the maximum of the latter being seven years; the longer it is written, the weaker it has become, in this, not to mention others. On the one hand, the utility of the law depends on the goodness of the information on which it has been founded; on the other hand, the most efficient of the three branches of the legislature is less and less adequate to the task of procuring good information, the longer it lives, till at last it ends its career in downright impotence.

Chabélaïs, living in a distant province, and desirous to see Paris, forged a quantity of *real* incriminating evidence calculated to throw upon him the suspicion of a state crime, and, upon the strength of it, was tried and condemned at free cost. On a favourable concurrence, the trick might not be altogether impossible of being done into English, by a political adventurer, richer in boldness than in the

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allotment, which, according to the established rules of evidence, is necessary to conviction; so often as any such failure takes place, so often does a guilty defendant escape, so often is the escape attended with a failure of justice: if the evidence be sufficient, and conviction takes place accordingly, even then the satisfaction of the judge and of the public fails of being so complete as it would be if the disposition on the part of the defendant to speak truth had not been checked, by those whose duty, at least in the moral view of the word, it was to cultivate it.

Evidence of inferior quality is in this case received alone, to the exclusion of evidence of a superior quality: of a nature which cannot fail of being more satisfactory to every mind to which it ever comes to be presented. The mendacity thus bespoken, and in a manner commanded, from the highest ground, on pretence of a regard to justice or humanity, but in reality for the purpose of gaining an unmerited popularity at the expense of justice, is sometimes fatal, and in no case of any use, to justice.

Compared, however, with the state of things in this respect as it stood till little above a century ago, the abuse thus noted is a prodigious improvement. A century has scarce elapsed since the practice was abolished, according to which, in a capital case, the witnesses for the defendant were examined without oath, and thence, (in case of mendacity) without being exposed to punishment.\* The practice thus abolished

\* Hawk. iv. 446. 1 Ann. c. 9. § 3.

was, in both points of view, pernicious : favourable in the highest degree to guilt, by leaving the door wide open to mendacious evidence on that side : unfavourable to innocence, by depriving veracious witnesses of whatever share of confidence it is in the power of the sanction of an oath, in these circumstances, to inspire.

The instances in which mendacity is forced upon the *pen* of the other party (the plaintiff or prosecutor), by those who, to the moré especial duty, add the exclusive power, of cherishing and enforcing on all occasions the opposite virtue ;—these examples, unhappily but too numerous, of corruption issuing in torrents from above, will be apt on this occasion to present themselves to a discerning mind.\* But the mischief, great as it is, belongs not to this place. If, by the contempt of veracity and the fondness for mendacity thus displayed, the morals of the profession, and (through that commanding channel) the morals of the community, are tainted in the most vital part ; the interests, however, of justice, receive not in this way any immediate prejudice : for, so far as the law in favour of mendacity is complied with, neither plaintiff nor defendant, neither innocent nor guilty, are in any respect the better for it. If, indeed, in any respect, compliance on the part of the plaintiff is deficient, a flaw is thereby pro-

\* *Ex. gr.* Cases in which facts that are either false or unascertainable are required to be averred in indictments, on pain of nullity : that the crime was committed at the instigation of the devil,—that the instrument employed in the commission of it was of such or such a determinate value, &c. &c.

duced, through which the defendant, if guilty, makes his escape. But the source from whence the advantage given to the defendant in this case is derived, is not the commission of mendacity on that side, but the omission of it on the other.

2. In non-penal procedure—in both branches of it, the common law and the equity branch,—it will now be seen in what abundance invitation is held out to mendacity on the part of the litigants on both sides, and in what abundancy of produce the fruit thus cultivated may naturally be expected.

In the common law branch, the regular course, in the shape in which it is pursued at present, can scarcely, in the minds of those who planned it, have had any other view. If, at the outset of every cause, the parties, in the presence of each other, and each of them interrogated by the other, were to produce at once the whole budget of their allegations, and their suspicions, as well as their demands, and that under the sanction of an oath; mendacity would not be hazarded by a man, in the station of a party, any more than in that of a witness. But the fundamental allegation, or body of allegations, termed the *declaration*, is made without any such check. This declaration gives commencement to the cause—operates as an introduction to the several steps and instruments that follow it. A man may be completely conscious of the badness of his own cause; he may be conscious that the facts alleged or assumed by himself are not true; he may be conscious that facts, such as, if proved on the part of the defendant, would defeat his (the plaintiff's) claim, did really

exist; whether the defendant be supposed to be in a condition, or not in a condition, to bring proof of them. In any of these ways he may be fully conscious of the falsity of his averments, and yet without being deterred from making them: these being among the occasions on which falsehood has received a licence to come forward and effect its purposes. As to costs of suit,—besides that this species of partial satisfaction is not in English procedure applied, with anything like consistency or uniformity, to the cases that call for it,—the inadequacy of it to the purpose in hand will be hereafter brought to view.

The whole system of what is called *special pleading*, is an edifice erected upon the corrupt foundation just described. The counter-allegations,—such reciprocal ones as the nature of the case admits of—these *pleadings* (as they are called)—instead of being extracted from the parties speaking *viva voce*, and face to face, under the authority and in the presence of the judge,—are kept back to be exhibited in writing, in a protracted succession, at distant intervals; and, be they ever so mendacious, no other punishment attaches upon the mendacity but the inadequate and irregularly applied punishment of costs.

In no respect whatever is direct justice benefited by this practice: collateral injustice, in its triple shape of vexation, expense, and delay, is produced by it in abundance.

The commencement as well as final cause of it, the origin of it in both senses, is distinctly before our view. We know of a time in which the abuse had no existence. Like libelling and

forgery, it has grown out of the art of writing. But forgery conducts men to the gallows, special pleading to the bench.

In summary procedure it is unknown: as happily and completely so, as in the domestic procedure—which, in forensic practice, serves as a model for summary procedure,—and from which the regular mode may be considered as being for the most part a causeless deviation.

On a variety of occasions it is excluded: the general issue is allowed to be pleaded: and the party to whom such permission is given, is the defendant,—the party whose interest on each such occasion insures his availing himself of it. The propriety of such exclusion is, in these several instances, unquestioned and unquestionable: but on no one of these occasions can it be justified, but by reasons which with equal cogency prove the propriety of the exclusion, the impropriety of this mode of procedure, in the several instances in which it continues to be employed.

Common law, the old original law of the country—common law, though “the perfection of reason,” was here and there a little scanty, and here and there a little harsh. Under the name of *equity*, a new and smoother kind of law has been half imported, half manufactured, to fill it up and smooth it.

In common law procedure, for the benefit of the lawyer, mendacity on the part of the suitor enjoys (as has been seen) an almost unbounded licence. If falsehood is, by those whose duty should naturally have been to suppress it, connived at and rendered profitable, and in that way encouraged; if such encouragement be a

mode of subornation; at that mode, however, it stops: understand, at common law.

Would you see it in a stronger and more efficient mode, you must look to equity. It is there that the apparatus of subornation is complete: it is there that the effect of it is altogether irresistible.

In equity procedure, the altercations between the parties, including the examination of one of them by the other, are carried on in the way of written correspondence. The cause opens by the plaintiff's address to the judge, who never reads it: to which the defendant, to whom it is not addressed, is to return an answer. This epistle is called a bill. The bill is composed partly of allegations, partly of questions. In the allegations are stated, on the one hand, the facts—such facts, designed to constitute a ground for the plaintiff's claim, as the plaintiff *knows*, or is made to pretend to know; on the other hand, such facts as he does not know, but which, by means of so many confessorial statements to be extracted from the defendant, he, the plaintiff, wishes and endeavours to *learn*. For this purpose the court lends its authority to the plaintiff (in equity, the complainant), with the readiness that may be imagined. It however makes one condition with him, viz. that every interrogatory put by him to the defendant shall have a *charge* to support it. In itself, the rule is sufficiently obscure and vague: but practice has explained and fixed it. If, for example, to make good your title, you want a deed, but know not where it is; if you tell the truth, and say you don't know where it is, you will never

get it. You must begin with saying you *do* know where it is; you must say that the defendant has it; and so, having complied with the condition, and said on your part what you know is false, you are allowed to call upon the defendant to declare on his part what is true.

In respect of delay, vexation and expense, the consequence of this sort of justice is not to the present purpose. In respect of mendacity, the effect produced on the state of the public morals by that vice, is another topic that belongs not to this place. Upon the administration of justice, and the advantage derived to judicature from evidence received in this mode, the effect in point of extent may be tolerably conceived from a fact soon stated. The answer being upon oath, may be true or not true: the bill, not being upon oath, is regarded as altogether unworthy of all credit.\* In the character of defendant, what a man says may be true or not true: in the character of plaintiff, what the same man says is not a syllable of it true. Why?—because, in the character of defendant, he is made to take an oath: in the character of plaintiff, he is neither subjected nor admitted to any such ceremony. And why, in the character of plaintiff, is he to enjoy this licence for mendacity? To justify

\* In here and there a scanty instance, the current of mendacity has indeed received a check: the facts stated in the plaintiff's bill being required to be verified by affidavit. But the same considerations by which the attention of the legislator is proved in these odd corners in the field of equity jurisdiction, demonstrate his negligence—his self-conscious negligence—in every other quarter of that vast expanse.

him for subjecting a man to the torment of the most tedious and expensive of all suits,—to justify him for stopping him in the pursuit of less expensive and vexatious remedies,—has the court any better, or other, warrant, than the assertion of a man who, by its rules and maxims, is unworthy of all credit?—whom it first forces to make himself a liar, and then stigmatizes for being so.

Besides the radical absurdity of the rule, in any other character than that of a contrivance to corrupt and oppress suitors for the benefit of lawyers; the uncertainty with which it is pregnant is without end. What breadth of charge shall be sufficient for the support of the interrogatories that a man may see occasion to exhibit? To furnish an answer to this question, adapted to all the modifications of which the case is susceptible, is of itself a topic, the discussion of which might be made to fill any number of volumes. Meantime, on every occasion, the prudence of the draughtsman fails not to satisfy him which is the safe side. From the omission of any portion of matter, which, in the eye of the judge *ad hoc*,\* may chance to present itself as necessary to enter into the composition of the charging part, to enable it to support the interrogatories grounded on it; inconvenience to his client, in the shape of vexation and delay, as well as increased expense, may ensue: from the insertion of any quantity beyond that which, on a just view of the matter, might appear strictly necessary, no

\* In the court of chancery, the master; in the court of exchequer, the barons, the judges themselves.

inconvenience in any degree approaching to equality can ensue: to the expense an addition, but that comparatively a very small one: to the account of delay and vexation, none. These things being duly considered, the conclusion is but natural. To give the reins to invention, and augment *ad libitum* the quantity of this species of poetry, will, so long as the above rule remains unrepealed, continue for ever the most natural and pleasant, as for ever it will continue to be the safest course.

## CHAPTER VI.

### OF THE CEREMONY OF AN OATH, CONSIDERED AS A SECURITY FOR THE TRUSTWORTHINESS OF TESTIMONY.

#### SECTION I.—*An oath, what?*

ON a former occasion, mention was made of the three great sanctions—the political, the popular, and the religious,—as so many powers usually, and in a certain sense naturally, employed, in the character of securities for trustworthiness in testimony. But their efficacy in that character will depend, in no small degree, on the mode in which application is made of them to that use. Although not expressly invoked, nor so much as regarded, by the factitious arrangements of judicial procedure; they might, notwithstanding, be by no means devoid of efficacy. But, in point of fact and general usage, a particular instrument has been employed for the special purpose of pointing their force to this special use. This instrument is the solemnity, or say ceremony, called an oath.

Contemplated in themselves, and abstraction made of the application of this instrument, they might be considered, in a certain sense, as so

many natural securities for testimonial trustworthiness: contemplated as applied to this special purpose by the intervention and assistance of this factitious instrument, their united force, so augmented and applied, may be considered as a sort of factitious or artificial security for trustworthiness, superadded to those natural securities.

But, in perhaps every civilised nation upon earth, (unless the Chinese nation, the most numerous of all civilised nations, be an exception,) the ceremony distinguished by the name of an oath, or what in other languages is equivalent to that word, has been designed or understood to involve in it an address (or at least a reference) to a supreme being or beings; to invisible, supernatural, and omnipotent, or at least superior, agents: and the object of this address or reference has been to engage those superior powers, or to represent them as engaged, to inflict on the witness punishment, in some shape or other, at some time or other, in the event of his departing knowingly from the truth on the occasion of such his testimony.

Unfortunately in some respects, this same ceremony, with the address or reference included by it, has (besides the above use) been employed as an instrument to bind men to the fulfilment of miscellaneous promises of all sorts: promises having no connection with testimony.

It has been applied promiscuously, and without any discrimination or distinction so much as in name, to purposes of the most heterogeneous nature: to the securing of veracity and correctness on the part of the swearer, on judi-

cial occasions, and thence to the prevention of deception and consequent misdecision on the part of the judge; and, besides that, to the securing the performance of other acts of all sorts.

At present, our view of the ceremony is confined to the case in which the purpose for which it is employed is that of securing the truth of testimony.

## SECTION II.—*Inefficacy of an oath, as a security for the trustworthiness of testimony.*

Consistently with the opinion so generally entertained by unreflecting prejudice, a place upon the list of securities for the trustworthiness of testimony, and thence against deception, and consequent misdecision and injustice, could not be refused to the ceremony of an oath. But, whether principle or experience be regarded, it will be found, in the hands of justice an altogether useless instrument; in the hands of injustice, a deplorably serviceable one.

1. The supposition of its efficiency is absurd in principle. It ascribes to man a power over his maker: it places the Almighty in the station of a sheriff's officer; it places him under the command of every justice of the peace. It supposes him to stand engaged, no matter how, but absolutely engaged, to inflict—on every individual, by whom the ceremony, after having been performed, has been profaned,—a punishment (no matter what) which, but for the ceremony and the profanation, he would not have inflicted.

It supposes him thus prepared to inflict, at

command, and at all times, a punishment, which, being at all times the same, at no time bears any proportion to the offence.

Take two offenders: the one a parricide, by whose false testimony his innocent father has been consigned to capital punishment; the other, by whose false testimony a neighbouring householder has been wrongfully convicted of the offence of laying rubbish on the highway. Take the offence in both cases on the mere footing of false testimony, one sees how unequal is the guilt,—and how widely different the punishment, which, consistently with the principle of religion, cannot but be expected at the hands of divine justice. Take it on the footing of perjury, the guilt is precisely the same in both cases: for in both cases the ceremony is the same; and, in both cases, it is alike violated and profaned.

In a certain sense, and with reference to a certain relative point of time,—the consent of the beneficent power over which authority was supposed to be exercised by a subordinate power, could hardly have been looked upon as wanting. It must have been considered as having been given, in general terms, at some anterior period: but,—being thus given, by an engagement, express or virtual, contracted by the superior being,—so long as the engagement thus entered upon was adhered to, the conduct of the superior being would not be less under the command of the inferior, than if the relation had from the beginning been reversed: and, whatever promise the superior being might, by means of the oath, be called upon by the inferior being to enforce,—to such promise, so long as the engagement was adhered to, it would not

be in the power of the superior being to refuse his sanction.\*

Will it be said, nay: for, after and notwithstanding this ceremony, God will govern himself by his own good pleasure, as he would have done without it: though the act which the oath-taker engaged himself thus to perform be unperformed, if that act be a criminal one, God will not punish him for the omission of it: commission, not omission, is what God punishes in crimes: Be it so: God will not punish the violation of an oath, when the act engaged for by it is the commission of a crime: God would not have punished Jephthah, had he omitted to put to death his unoffending daughter, notwithstanding his eventual promise so to do. Be it so: but, this being supposed, here is an end of the efficacy, the separate and independent efficacy, of an oath.

To the purpose in question, the authority given by the oath to the inferior being over the superior must have been understood to be absolute, or it must have amounted to nothing. Were there any exceptions or limitations? If so, the imagination is set to work to look out for the terms and grounds of such exceptions and limitations: to enquire, for example, into the species and degree of *mischief* that in each

\* In *specie* it was the same sort of authority as that which was supposed to be exercised by magical incantations: exercised only over a different sort of supernatural person, and to different and even strongly contrasted purposes. The authority exercised by a testimonial oath, was exercised over a divinity spoken of in the character of a beneficent divinity, and for purposes spoken of in the character of beneficial purposes: the authority exercised by a magical incantation, was exercised over a maleficent divinity, and for pernicious purposes.

instance might be expected to result from the violation of testimonial truth. But, if *this* then be the ground of the supernatural punishment attached to the violation of the oath,—then the mere violation of the oath itself, independently of the mischief resulting from the falsehood, is not that ground: that is,—the effect produced by the oath, considered in and by itself, amounts to nothing.

In vain would it be to say—No; when God punishes for perjury, though he punishes for the profanation, that does not hinder but that he may punish for the false testimony in proportion to the mischievousness of the effects produced by it. Whatever reason there is for supposing him to punish for the false testimony, there is the same reason for supposing him to punish for that crime, whether the profanation be or be not coupled with it. Whatever punishment is inflicted by him on the score of the false testimony, is not inflicted by him on the score of the profanation: whatever is inflicted by him on the score of the profanation, is not inflicted by him on the score of the false testimony.

Either the ceremony causes punishment to be inflicted by the Deity, in cases where otherwise it would not have been inflicted; or it does not. In the former case, the same sort of authority is exercised by man over the Deity, as that which, in English law, is exercised over the Judge by the legislator, or over the sheriff by the Judge. In the latter case, the ceremony is a mere form, without any useful effect whatever.\*

\* “The alternative to which Providence is by consequence reduced, of either giving up that country to everlasting superstition, or of working some miracle in order to accom-

**2. To justice it is not of any the smallest use.  
The only character in which it is in the nature**

plish its conversion." Such are the words in which (in the Edinburgh Review for April 1808\*) a reverend divine is represented as describing one of the consequences which, in his view of the matter, will ensue, should the arm of government be employed in restraining, by coercive measures, the exertions directed to the extension of the benefits of Christianity to the natives of Hindostan. "The idea of reducing Providence to an alternative!!" exclaims the reviewer in a double note of admiration: "and by a motion at the India-House, carried by ballot!"—"Providence reduced to an 'alternative!!!!'"—another exclamation by notes of admiration five deep. Then,—for the declared purpose of representing the idea as the *ne plus ultra* of irrationality—this and that and the other idea, represented as irrational, is said to be pure reason when compared to it.

The ground on which the line of conduct thus protested against as tending to reduce Providence to an alternative, is censured, is that of its being too great a power for human imbecility to exercise, or so much as to attempt to exercise, over divine omnipotence. But the power, the supposed exercise of which drew from the reverend divine the apprehension and the censure expressed in the above passage—this power, if, indeed, it reduced the Supreme Being to an alternative, left him, at any rate, in possession of an alternative: and an alternative which does not present itself to human conception as pregnant with any considerable degree of distress.

But the notion which represents the common ceremony of an oath as entailing, and without recovery, guilt—with its inseparable appurtenance, future punishment—on the violators of it; and this, independently of, and over and above, whatever may be attached to the occasion; leaves to divine omnipotence no alternative. Bailiff to and under the human magistrate, the divine functionary has given bond for the execution—the constant and punctual and sure execution—of whatsoever writ shall be sent from the court below to the court above: for, when the idea is so self-contradictory, language is at a loss how to phrase it.

The human power, which, reducing divine omnipotence indeed to an alternative, leaves it at any rate in possession

\* Page 180.

of it to render—in which it has ever been supposed to render—service to justice, is that of a security against a man's doing what (on the occasion in question) he has engaged not to do: viz. assert what he knows or believes to be false. But that in this character it is altogether without efficacy, is matter of daily and uncontested and uncontrovertible experience. On the part of the most exalted characters, it is seen every day yielding to the force of the weakest of all human motives.

Comparison being had with the motives of the two other classes, viz. the self-regarding,

of an alternative, is not proposed to be exercised by any other hand than one, and that the hand of the supreme authority in the state: the power which leaves omnipotence no alternative, is a power which any and every individual in the state, who is rash enough and foolish enough, may exercise at any time, and any number of times, at pleasure: on so simple a condition as that of getting a justice of peace to join in the performance of the instantaneous ceremony.

God made man after his own image, says the text: man has returned him the compliment, says I forget what commentator. "Every man his own broker" is the title of one book; "Every man his own lawyer" of another: difficult as it is for any (not to speak of every) man to be his own broker, much more his own lawyer, no man finds any difficulty in being his own God-maker: and when a man has made his God, we see the sort of work he puts him to. The God of the good sort of man is himself a good sort of man: but the God of the vulgar, great and small, is what the God of Samuel Johnson was—a devil, with the name of God written in great letters on his forehead.

O that, in making his God, man would but content himself in making him for his own use! But no, it is not for his own use, it is not for his own benefit at least, that man makes his God; but for the destruction of others, of all others who presume to differ from him: and who, for this offence, are, on any the slightest pretence, doomed to unutterable torture without end in another world, together with such as can be inflicted by the present and ready-prepared engines of the civil magistrate in this.

and the dissocial; the weakest upon the whole, in the great mass of mankind, are those which, belonging to the social class, may be referred to the head of sympathy: of which that sort of sympathy towards an individual, commonly characterized by the term *humanity*, is one.

But, of all descriptions of men, (hangmen perhaps excepted, butchers certainly not excepted), the lawyer, and, among the lawyers of all nations, the English lawyer, is he on whom,—judging from situation, from habitual exposure to the action of opposite interest, or from historical experience,—the principle of humanity may with reason be regarded as acting with the smallest degree of force. For, under the existing mode of remuneration (viz. by fees), there is no other class of men whose prosperity rises and falls in so exact a proportion with those miseries of mankind which it is in their power to increase or decrease: nor any set of men, who have had it so effectually in their power, and so determinedly and inexorably in their will, to preserve those miseries from decrease. Unfortunately; this hostility, (though undeniable), not being perceptible without such an insight into the system of procedure made by them, as scarce any but themselves find adequate inducements for obtaining, can never be rendered so easily perceptible, as, for the preservation of the rest of the community, it were so desirable that it should be.

Weak as, in the breast of an English lawyer, this weakest of all human motives cannot but be; and more especially in the breast of an English lawyer whose acknowledged experience has raised him to the situation of judge;—in that situation it is found habitually strong.

enough to overpower whatever regard, if any, is lodged in the same bosom, for the ceremony of an oath.

Many and notorious are the occasions on which, in violation of their oaths, a set of jurymen,—for the purpose of screening a criminal from a degree of punishment to which the legislature has declared its intention of devoting him,—ascribe to a mass of stolen property a value inferior in any proportion to that which, to the knowledge of every body, is the real one: and this, under the eyes and direction of a never opposing, frequently applauding, or even advising, judge: so that here we have in perpetual activity as many schools of perjury, as there are courts of justice having cognisance of these the most frequently committed sorts of crimes; schools in which the judge is master, the jurymen scholars, and the by-standers applauders and encouragers.

Not that there exists, perhaps, any other nation, in which a due regard to veracity on the occasion of testimony is more general. But, of this regard (be it more or less extensive) the cause must be looked for in the influence of those other *really* operative securities, to which, in compliance with usage, this delusive one has been so undeservedly associated. What is not only possible but probable, is, that, in the production of this regard, the religious principle, the fear of God, has no inconsiderable influence. What is certain, as being rendered so by the above experience (not to mention so many others as might be adduced) is, that, in the application thus supposed to be made of it, the religious principle has no influence.

Under the ceremony of an oath are included, it is to be observed, two very different ties; the moral, and the religious. The one is capable of being made more or less binding upon all men: the other upon such only as are of a particular way of thinking. The same formulary, which undertakes to draw down upon a man the resentment of the Deity in case of contravention, does actually, in the same event, draw down upon him (as experience proves) the resentment and contempt of mankind. The religious tie is that which stands forth, which makes all the show, which offers itself to view: but it is the moral tie that does by far the greatest part of the business. The influence of the former is partial; that of the latter is universal: nothing, therefore, could be a mark of greater weakness and imprudence than to cultivate the former only, and neglect the latter. As to the religious tie—not only are there many on whom it has no hold at all; but, in those on whom it has a hold as well as the moral, that of the moral is beyond comparison the strongest. Can anybody doubt that among the English clergy (for example) believers are more abundant than unbelievers? Yet, on some occasions, oaths go with them for nothing.

What gives an oath the degree of efficacy it possesses, is, that in most points, and with most men, a declaration upon oath includes a declaration upon honour: the laws of honour enjoining as to those points the observance of an oath. The deference shewn is paid in appearance to the religious ceremony: but in reality it is paid, even by the most pious religionists, much more to the moral engagement than to the religious.

It is, in truth, to the property, which the ceremony of an oath possesses, of weakening the power of the only really efficacious securities, that what influence it has is confined. In the character of a security for veracity, take it by itself, it is powerless, and may plainly be seen to be so.

Applied to judicial testimony, if there be an appearance of its exercising a salutary influence, it is because this supposed power acts in conjunction with two real and efficient ones : the power of the political sanction, and the power of the moral or popular sanction. When, to preserve a man from mendacity,—in addition to the fear of supernatural punishment for the profanation of the ceremony,—a man has the fear of fine, imprisonment, pillory, and so forth, on the one hand ; the fear of infamy, the contempt and hatred of all that know him, on the other ; it is no wonder that it should appear powerful. Strip it of these its accompaniments—deprive it of these its supports—its impotence appears immediately.

But, of a case in which it is thus deprived of its supports,—and in which impotence, complete impotence, is the consequence, the notorious consequence, of such deprivation,—the bare word *Custom-house oaths* is sufficient to present to view the complete exemplification.

So long as two forces, pointing towards the same object, are followed to a certain degree by the effect they aim at, without its being apparent in what proportion they have respectively contributed to the common end ; the credit of the result may be given to whichever of the two is most in favour. Watch them, and

catch them acting separately, or in opposition; then is the time to see how far the credit given has been due. In certain cases, the tie of an oath is seen to have a powerful effect upon mankind.—Where? In what cases?—Where the force of public opinion acts under its command: where it employs itself in insuring the veracity of parties or witnesses in courts of justice (especially in civil causes—or in criminal ones, where falsehood has not the plea of compassion or self-preservation to extenuate it). In other cases, oaths are cobwebs, or at best hairs.—In what?—In all in which the force of public opinion runs counter, or does but withhold its aid: in the case of jurymen's oaths, in a variety of instances: in the case of a variety of other offices: in the case of university oaths: in the case of custom-house oaths: in the case of *subscriptions*,—which, considering the solemnity of the act, and the awfulness of the subject, may be placed on the same line with oaths.

If you wish to have powder of post taken for an efficacious medicine, try it with opium and antimony: if you wish to have it taken for what it is, try it by itself.

That in England, in the governing part of the public mind, there has always prevailed a sort of tacit sense of the inefficacy and inutility of this ceremony in the character of a security for testimonial veracity, is evidenced, not by any explicit verbal declarations indeed, but by tokens still more trustworthy—by long continued practice.

On the occasion of the inquiries carried on by the House of Commons,—whether by the

whole House in the form of a committee, or by detached committees,—no oath is administered (at least in general practice) to any persons examined in the character of witnesses. The ceremony is suffered to remain unperformed. Why?—because, none of the really efficient securities\* being wanting, the want of this inefficient one is thought not worth supplying.

This branch of the legislature, not possessing, like the other, ordinary judicial powers, possesses not (it may be said) the power of exacting the performance of this ceremony. Be it so: but this, instead of a refutation of the proposition above advanced, is a confirmation of it. Is legislation of less importance than judicature? So far from it, the importance of an act of legislation is to that of an act of judicature, as the whole number of subjects in the empire is to 2. Is information concerning matters of fact less necessary to constitute a just ground for an act of legislation than for an act of judicature? Nor that neither.

Had the performance of this ceremony been really necessary, or been really thought necessary, to the forming of sufficient grounds for legislation; would the most efficient of the three branches of the supreme power have acquiesced thus long under the non-possession of it?

Conceive the courts of justice throughout

\* Subjection to interrogation *ex adverso*; backed by fear of punishment and of loss of reputation, to enforce compliance.

the country, all of them abundantly provided with the power of administering oaths, all of them destitute of the power of applying punishment: in what degree of vigour would have been the power of these courts? For what length of time, in that case, would society have held together?

If, in the character of a security for testimonial veracity, this ceremony were seriously looked upon as possessing any considerable value; the occasions to which the ordinary judicial securities failed of applying, at the same time that the value at stake is equal to any pecuniary value that is ever at stake in judicature, these are the occasions on which this supernatural security would (at least supposing any tolerable degree of providence or consistency on the part of the ruling power) have been resorted to with particular care. I speak of the cases where money is to be received by individuals at any of the public offices instituted for that purpose: the Bank of England, the Navy and Army pay-offices, and so forth. For one pound paid by the appointment of a court of justice, fifty or a hundred pounds perhaps are paid in and by these non-judicial offices. In these pay-offices; there being no adverse party to contest the claim; all those ordinary securities, to the application of which the diligence of an adverse party is necessary, (cross-examination, facility of counter-evidence, and so forth,) are of course inapplicable. For the protection of so prodigious a mass of property, under the deficiency of ordinary securities, what does legislative providence? Does it call in, with peculiar

anxiety and exclusive or superior confidence, this extraordinary security? Does it employ oath without punishment? On the contrary, it employs punishment without oath.\*

Another proof of the inefficiency and inutility of the ceremony of an oath, in the character of a security for the truth of testimony. Of the modes of delivering evidence—of delivering what is equivalent to testimony,—that which is susceptible of having the ceremony attached to it, is but one. Of the modifications of mendacity (or, what is equivalent to it, the endeavour to gain credence for false facts), that which is chargeable with the profanation of this ceremony,—that which is, in consequence, susceptible of the appellation of perjury,—*mendacious deposition*,—is but one. The others (as we have seen) are, forgery commonly so called (forgery in respect of written evidence); forgery in respect of *real* evidence; fraudulent obtainment; and personation.† For the prevention of these modifications of *mala fide* falsehood, punishment, simple punishment, has all along been trusted to: without any assistance from the ceremony of an oath, and apparently

\* In some of the above cases, the title to the money rests solely upon the authenticity of a script, an order, or other voucher, produced in the character of an article of written evidence. In these cases, he who, instead of an authentic, produces a counterfeit, script, subjects himself to the punishment (generally capital) appointed in case of forgery. In others of these cases, the mere identity of the person is the efficient cause of title. In these cases, he who, not being the person entitled under a certain name to receive a certain sum of money, represents himself as being that person, and receives the money accordingly, subjects himself to the punishment (generally capital) appointed for this offence, under the name of personation.

† See the last chapter, sec. 1.

**without any suspicion of deficiency on the score of the want of such assistance.**

True it is that, in those several cases, it may happen to the species of fraud which is not perjury, to be supported by deposition delivered to a court of justice; in which case, the punishment appointed for those several offences will receive, from the ceremony of an oath, whatever support it is in the power of that ceremony to give. But this is but a contingency; and that, comparatively speaking, but seldom exemplified: the case in which the punishment annexed to these offences respectively derives no support from the oath, is by far the most common case.

To the persuasion thus indicated on the part of the governing class, add the like persuasion as indicated on the part of all persons without distinction, in the character of suitors and their law advisers.

Supposing a man wrongfully deprived of the possession of any moveable thing belonging to him; and supposing him to demand restitution of it by the only species of action by which specific restitution is so much as professed to be given; in that case, if the defendant,—performing the ceremony of an oath in conjunction with twelve other men speaking only to his character, and not so much as professing to know any thing about the matter,—will take upon him to say, in general terms, that the plaintiff's demand is not a just one,—the plaintiff therefore loses the cause: neither can any question be put to the defendant, for the purpose of bringing down from generals to particulars such his self-regarding and self-serving testimony; nor are any wit-

nesses, in support of the plaintiff's demand, permitted to be examined. The man who professed this curious kind of evidence, was said to *wage his law*.

By what exertion of fraud or imbecility, any species of demand (or *action* as it is called) was thus paralysed, or why one species more than another, are questions which, at this time of day, must be left to the industry of antiquarians. In point of fact, so it is that, to a man who claims the thing itself, this species of defence is still liable to be opposed; while, to the man who, instead of the thing itself, claims money in the name of satisfaction, this same sort of defence is not capable of being opposed. What has been the consequence? That the action of *detinue*,—the only action at common law by which a man can claim the thing itself,—has, for ages, been abandoned altogether: the action called *assumpsit*,—the action by which a man, instead of the thing, demands money under the name of damages,—is the action employed in lieu of it. Men, all men, have all this while, under the guidance of their law advisers, chosen to give up every thing moveable they had been accustomed to call their own, rather than trust to this supernatural security, to the exclusion of the other natural ones.

As to judges (I speak of English judges, and more particularly of the highest stages in that office), the contempt universally entertained by them for this ceremony, stands evidenced by every day's practice.

No jury is ever impanelled, but their entrance into their ephemeral office is prefaced by what is called their oath. Each man bearing his part in this ceremony, promises that the verdict

in which he joins shall be according to the evidence, *i.e.* according to his own conception of the probative force of the evidence. What is the consequence?—that, so far as in relation to this probative force (*i.e.*, as to that one of the two sides of the cause, to which the greatest quantity of probative force applies) there is any ultimate difference of opinion,—some proportion out of the twelve, any number from one to eleven inclusive, has committed perjury. Lest the consummation of this perjury should be delayed for an inconvenient length of time, a species of torture has, by the care of those judges by whom the foundation of this species of judicature was laid, been provided for the purpose: a species of torture composed of hunger, cold, and darkness. Hence judicature by jury is a sort of game of *brag*, in which the stake is won by the boldest and the most obstinate: they or he remain unperjured all the others perjured. Of all the men of law that ever sat upon the official bench, by what one could this carefully-manufactured and perpetually-exemplified perjury have been unknown? By what one of them was it even spoken of as matter of regret?

On the contrary, Englishmen of all classes, non-lawyers and lawyers, have been at all times vying with one another in their admiration, their blind and indiscriminating admiration, of a ~~an~~ institution into the basis of which a necessary course of perjury had been wrought: and, at the same time (as if to crown the inconsistency) the oath, the sacred oath, has ever been sounded in men's ears: as if in *that* consisted the principle, if not sole, security, for whatever regard for justice is looked for at their hands.

Nor yet is it to the *inevitable* perjury, the perjury without which the business could not go on,—nor yet is it to the complacency with which this really accidental accompaniment is regarded,—that the proofs of the contempt entertained for the ceremony by all classes, judges and jurymen as well as suitors, lawyers as well as non-lawyers, is confined. Business would not the less go on, although effects to which jurymen are called upon to set a value (the true value) upon their oaths, were accordingly to be appreciated, appreciated without exception, at their true value: although a purse of money, with money of the real value of three pounds, were appreciated at three pounds, instead of being appreciated at nine and thirty shillings. Yet what sessions ever passes over at the Old Bailey, without giving birth to instances, more than one, in which effects, known by all mankind to be worth three pounds, or ever so much more, are valued at less than forty shillings? Valued, thus under-valued, and for what purpose? For what, but to set their power above that of the law; and, in the very teeth of the legislature, consign to a less degree of punishment, some criminal, for whom a greater degree of punishment has been appointed by parliament? When a judge is really displeased with a verdict, his practice and his duty is to send them back to their box, or their room, with a recommendation to reconsider it. What instance was ever known of a judge sending back a jury, with a recommendation to exonerate their consciences of a load of perjury thus incurred? On the contrary,—whether by judges, by lawyers of other classes, or by non-lawyers,—in how many instances has

such perjury been ever spoken of with any other note of observation, than what has been expressive of approbation and applause? Mercy—humanity—such are the eulogistic names bestowed, regularly bestowed, upon the profanation of this ceremony: as often as the object of the profanation has been to usurp a power lodged by the constitution in other hands, and put the most marked contempt that can be put, by a subordinate authority upon superior law.

Blessed effect of this ceremony and its vaunted sanctity! Judges designating by the self-same name the practice they punish, and the practice they encourage! Punishing at one time,—promoting, enforcing, at another—the same thing, or at least what they bid men look upon as the same thing: for, to cause two things to be looked upon as the same thing, what shorter or more effectual course can a man take, than to call them by the same name?

In the well-known epigram of Prior, the story of the fat man in the crowd, complaining, in terms of impatience, of the inconvenience of which in his own person he was in so great a degree the cause, presents, as it flows from the pen of the poet, no other sentiments than those sentiments of ridicule and pleasantry which it was intended to excite.

Sentiments of a somewhat different complexion, may perhaps be excited, in the instance of the mischief now upon the carpet, that of perjury,—when, in the persons of the most constant complainers of it, and indefatigable declaimers against it, we find the chief and unceasing encouragers, and, as far as encouragement goes, authors: encouragers in every

mode and form in which encouragement can be administered ;—example, precept, commendation, reward, punishment : punishment attached, not, as might have been supposed, to the incurring of the guilt, but to the abstaining or omitting to incur it :—the punishment here spoken of being not that which is administered in ceremony, half a dozen times perhaps in the year, with the professed view of curbing it ; but that which is administered without ceremony every day in the year, not merely in the design, but with the indisputable effect, not merely of promoting, but of securing, the perpetration of it.\*

\* “*Oaths*” the seed, “*perjury*” the “*harvest*. ” Such is the husbandry which by Blackstone\* is spoken of as actually pursued ; and of which, by the mention made of it in these terms, his disapprobation is pointedly enough declared. O yes ! bad indeed was such husbandry in *that case*. And why in *that case* ? Because, in *that case*, the husbandman was a competitor in trade : the judge, or the practitioner, in a rival set of judicatories ; which,—though (under the auspices of the fee-gathering system) united by a common interest with his own,—had also for a source of rivalry and discord, its separate interest. Never can he bring himself to speak without a sarcasm, of the business of those decayed and petty traders, (once, in the good old times, at the head of the trade,) whom the vast firm to which he belongs have now, for such a length of time, kept like toads under a harrow. Viewing in every rival an usurper, he grudges them even their wretched remnant in the trade of wickedness.

On this occasion, could he but have looked at home,—had the range of his optics been somewhat more extensive, and somewhat more under command,—he would have thought a second time, before he had hazarded an imputation so easily retorted and with such increase of force.

In the nursery of a spiritual court is no such *forcing frame* as a *jury-box* : no such horticulturist as a lord chief justice. In the spiritual nursery, perjury is but a sort of

\* II. 344; and see IV. 361.

### SECTION III.—*Mischievousness of oaths.*

Inefficacious as is the ceremony of an oath to all good purposes, it is by no means ineffectual to bad ones.

weed—an accidental product: the system, if *purposely*, is at least not *avowedly*, directed to the production of it: when it does spring up, the cause of its growth is not in the cultivator only, but in the soil likewise. But in the profane nursery, the cultivator is actively and conspicuously employed in *forcing* it: nor is that soil to be seen anywhere in which it can fail to grow.

Shift the scene,—give to another set of lawyers the benefit,—and perjury now becomes *pious*. Employ it (as above) in the jury-box, to debilitate the understanding, as well as taint the morals, of the people, and thus render them passive tools and unresisting victims in the hands of this domineering and now uppermost set; and the choicest epithet, how incongruous soever, is not too good for it.

*Pious* is, of all others, the epithet chosen by Blackstone\* for perjury, when (under the direction of common-law judges) employed by jurymen to rescue criminals from a punishment to which they have been devoted by the legislature. “*Pious perjury*:” as who should say—loyal treason, humane assassination, honest peculation, chaste adultery. *Humane* perjury,—yes, in this case, beyond dispute: *moral* perjury,—even that might pass: but, of all imaginable eulogistic epithets (eulogy being the strain to be pursued at any rate) why pitch upon that of *pious* to affix to perjury? why thus volunteer a flat contradiction in terms? Why, but to reconcile to the practice those pious persons, who, looking down upon morality, look up only to piety, as that in comparison of which all other objects are unworthy of regard. With these,—whatsoever of humanity, or utility in any other shape, might appear predictable of the practice,—the impiety of it might be apt to be considered as an objection to it, and that objection an insuperable one. What is to be done? Give them to understand that (in this instance at least), perjurious as the practice is, there may still be piety in it; the objection is removed, and “everything is as it should be.” When every other argument fails, then is the time to try what can be

\* IV. 239.

1. Under the name of the *mendacity-license* will be hereafter treated of at full length, one of the principal among the devices, by which,

done by a bold paradox: the holder it appears, the more difficult it is for the disciple to be persuaded, or to suffer himself so much as to entertain the suspicion, that, without some sufficient reason at bottom, so great a master would have given utterance to it.

In the eye of the man of law (not to speak at present of the priest), whether an act be right or wrong, is a question that depends never on the act itself, but always on the quality of the persons by whom it is practised.

Practised by a "bishop," that bishop being a papist, "subornation of perjury" was a bad thing: no *piety* in it: sheer "wickedness," and nothing else.\* On this occasion, a system of contrivance is reported, by which,—when a clerk (meaning here by a clerk, perhaps a clergyman only, perhaps any man who could read) when a clerk had in a capital crime been defendant,—if, in that character, he had been convicted by a lay jury, he used to be saved from punishment: the contrivance consisting in making him pass through the formality of a sort of *new trial*, in which the bishop sat as judge; the jury being, as Judge and Reporter Hobart represents it, "compounded of clerks and laymen;" or, as Blackstone, referring to Hobart, finds it more convenient to misrepresent it, "composed of twelve clerks."

On every such occasion (to take the account of the matter from Blackstone) might be seen "a vast complication of perjury and subornation of perjury, in this solemn farce" (so he calls it) "of a mock trial: the witnesses, the compurgators" (twelve of them) "and the jury, being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted, and *almost compelled*, to swear himself not guilty: nor" (adds he) "was the good bishop himself," (good being the epithet applied to this papist to make the sarcasm the more caustic); "the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share in it."

Against this "perjury and subornation of perjury" lest our indignation should not be strong enough, the learned com-

\* Blackstone, iv. 360.

under the fee-gathering system, judges,—the authors of unwritten law in both its branches, the main, or substantive branch, and the ad-

mentator sets out with informing us, that “in the beginning of the (then) last century it was remarked on with much indignation by a learned judge,” viz. judge Hobart, whose reports constitute the authority to which he refers.\*

On this occasion, the learned judge, it must be acknowledged,—without any apparent scruple, reserve, or affected delicacy, such as, in this age of refinement, a non-lawyer, an unlicensed person at least, might be expected to observe,—speaks out and calls things by their names. “The perjuries indeed” (quoth he) “were sundry: one in the witnesses and compurgators; another in the jury, compounded of clerks and laymen; and of the third, the judge himself was not clear, all turning the solemn trial of truth by oath, into a ceremonious and formal lie.”

As to the ceremony of riding off on the backs of twelve compurgators; in civil cases, to a great extent, under the learned judge’s own sort of law, it then was, and still is, law at this day.† It might be brought into exercise any day, and would be every day, but for a more modern quirk by which the original quirk is evaded.

As to the “ceremonious and formal lie,” it is no other than that which, under his own sort of law, is pronounced, as often as, among the reverend Dr. Paley’s “twelve men taken by lot out of a promiscuous multitude,”‡ any difference of opinion has place: and this in virtue of the torture applied with the knowledge and under the authority of the judge, but without the need of any work and labour done by the reverend artificer, in the subornative line, for the purpose of giving existence to the lie: not to speak of the cases, in which,—the perjury (when committed) being of the pious sort recommended under that name by Blackstone,—the learned judge, ambitious of taking his share in the praise of piety, makes special application of that “countenance,” which, had the judicatory been of the spiritual law, instead of the common law, class, would have made the scene of perjury and subornation a scene of wickedness, and himself, in the bitter sense of the word *good*, a “good” judge.

\* Hob. 289. 291.

† Wager of Law.

‡ Paley, II, 263.

jective branch, or system of procedure,—have, with so disastrous a success, pursued the ends, the real ends, under the fee-gathering system the only ends, of judicature. It is by the license granted to mendacity on both sides of the cause, that judges have given encouragement and birth to their best customers, the *malā fide* suitors. It is by means of the vain and pernicious ceremony of an oath, that they have been enabled to grant and vend the mendacity-license. The punishment due to testimonial mendacity has been artfully attached, not to testimonial mendacity, but to perjury: not to testimonial mendacity in all cases without distinction, but to testimonial mendacity in such cases and such cases alone, in which mendacity has by their authority been converted into perjury: which conversion cannot be effected without the previous ceremony of an oath; of which ceremony they have, at pleasure, caused, or forborne to cause, the performance: and, when the religious ceremony has been withheld, they have not only exempted the offence from punishment, but, by exempting it from punishment, they have exempted it from infamy also.

2. The ceremony having acquired a technical denomination, that of an *oath*,—a substantive

As to the “*complication*,” with which the mode employed on this occasion by these ecclesiastical judges, for the giving impunity to criminals, appears so justly chargeable; it must be imputed to a comparative deficiency in respect of those associated endowments of genius and courage, which, with such brilliant success, have been displayed by their lay brethren of the trade: by so simple an invention as that of a flaw in the indictment, all this “*complication*” might have been saved.

which is understood to have for its *quasi-conjugate* the verb *to swear*; religionists of different descriptions, (in particular those called *Quakers*), have, by a principle of religion, been prevented from taking a part in it. The consequence has been a license, *inter alia*, to commit, to the prejudice as well of Quakers as of all other persons, every imaginable crime, of which, in whatsoever number, Quakers, and they alone, shall have been percipient witnesses.

From the class of wrongs called *civil*, the license has, by an act of the legislature, in case of a Quaker witness, been withdrawn: viz. by substituting to the words *oath* and *swear*, the words *affirmation* and *solemnly affirm*: but to the encouragement of the class of wrongs called *criminal* (to which class belong those which are of the deepest die) the license continues to operate with unabated force and efficacy.

3. The last which shall be here mentioned of the wounds inflicted upon justice by this disastrous ceremony, is one, of which, on the present occasion, a short hint is all that can be afforded.

Of the mischief done to justice by the door so inconsistently shut against evidence from the most satisfactory source, viz. confessional evidence, if presented in the best shape; while, to evidence from the same source, on condition of its being presented in some less trustworthy shape, the same door is left wide open; mention will be made in the sequel.\* To an exclusion thus prejudicial to justice, it seems as if the ceremony of an oath, with the prejudices that cluster round it, had been in some degree ne-

\* See Book IX. EXCLUSION.

cessary. That sacred regard for the ceremony of an oath,—that awful sense which, if it ever was alive, is seen to be so effectually dead, in judges and jurymen—has been supposed to be essentially and tremblingly alive in robbers, murderers, and incendiaries. If (what is not durable) a man of any of these descriptions were, on his trial, to be subjected to examination, as well as his accomplice on whose testimony he is about to be convicted ; the oath so regularly tendered to the one must not be tendered to the other ; for it would be a snare laid to his conscience : and thus it is, that, not being to be interrogated upon oath, he is not to be interrogated at all.

Note, that, to one who is really innocent, neither oath nor question can be a snare. It is only on the supposition of his *being* the robber, the murderer, or the incendiary, which he is supposed to be, that his conscience can be afflicted with the qualms supposed to be infused into it by that ceremony, which is trampled upon even to ostentation by jurymen and judges.

In compelling a man, in the character of an extraneous witness, to declare what he knows touching a transaction in which he has no pecuniary, or other reputedly considerable, interest; and, on the occasion of such a declaration to such an effect, to join in the ceremony of an oath ; the man of law, the English lawyer for example, finds not the smallest difficulty. In compelling a man, in the character of a party—in the character of a defendant—always with the same ceremony, to make a declaration, in consequence of which (if true) he may find himself

divested of the possession of an estate to any magnitude, the property of which, till the question had thus been put to him, he had conceived no apprehension of not carrying with him into his grave; the man of law, and again the English lawyer, finds as little difficulty.

But now comes another case: the defendant is under prosecution for a crime, for which, if convicted, he will be punished with death. Now then, shall a man thus circumstanced be put to his oath? Forbid it religion! forbid it humanity! What! subject him to a temptation, under which it is not possible he should not sink! force him, and at such a time, to commit perjury! His body is to be sent to the worms: and, before it has time to reach them, is his soul to be consigned into the hands of the devil,—of the devil, at whose instigation the crime, if committed, was committed,—his soul to be consigned over to the devil, to be plunged immediately into hell!

Whence comes all this tenderness, this delicacy, this difficulty? It arises principally, if not entirely, out of the oath. Take the man out of the court of justice; out of that place, where everything that passes, passes in the face of day; where,—either by threats, promises, or other undue influence—by threats of severity, by promises of mercy or positive reward—the idea of seducing his testimony from the line of truth is hopeless and without example;—take him into a forest, or a dungeon, into a recess of any kind, into which no third eye can penetrate; in this case, whatever he may have been made to say, though to his own indubitable

condemnation, is unexceptionable evidence. Why? because, in that case, there is no oath, no perjury: if his body goes to the worms, and his soul to the place of endless torment, it is for whatever he has done; it is not for what he has thus said; it is not for the perjury.

But the mischief, and the difficulty, the inconsistency, end not here. Not only when life may be saved by perjury, may not the temptation be too great? May it not also be too great, when liberty, reputation, property, the great bulk of a large property, may at this price be saved? and so down to a fine of five shillings? Would not this too be laying a snare for men's consciences? Was not this the cruelty practised by the wicked judges of the star-chamber? Could it be proved that a judge of the star-chamber ever folded a piece of paper in three folds—would not the wretch who should presume, at this time of day, to fold a piece of paper in three folds, deserve to be held in execration by all posterity?

Thus it is, that, in the case of a defendant, you must not have the security, the supposed security, that an oath would give: and, because you must not have the sham, the hollow, security that this ceremony could give, you must not in this same case have the real, the substantial, security that punishment would give: punishment applied to mendacity in this, as in any other case.\*

\* What then? it may be asked: by threatening a man with inferior punishment in case of mendacity, would you expect to see him, by veracity, subject himself to superior punishment? By threatening him eventually with punishment short of death, would you expect to see him subject

It was simply in the character of a security for veracity, and in respect of its inefficiency and inaptitude in that character, that the ceremony of an oath fell to be considered here. Its efficiency, its unhappy efficiency, in a very different character, that of an instrument of tyranny and improbity, by serving to bind men to the performance of engagements fraught with the most pernicious consequences to themselves and others, belongs not directly to the present purpose. The purposes to which it has thus been applied, being not the less to the list of the objections to the use of it: but, not being directly applicable to the purpose in hand, to mention them *pro memoria* may in this place be sufficient.

Suppose but an atom of punishment attached to the profanation on its own account merely—on its own account merely, and, if that be the case, inseparably attached to it; so far as that supposition extends, so far the institution of an oath is mischievous, and purely mischievous.

himself for a certainty to the very punishment of death? No, surely: nor in that case is it necessary to subject a man, in case of mendacity, to any separate, independent punishment. Undetected, it cannot be punished in any case: detected, it will in general subject him to the proper punishment: to the very punishment, from which, by that fresh crime, the natural consequence of every former crime, he struggled to escape from it.

Not that, even in this case, punishment as for mendacity would be necessarily without its use: for a man who is innocent has everything to lose by mendacity, nothing to gain by it: and it may happen that, though the former crime which he has committed may not be susceptible of sufficient proof, yet among the lies which he has uttered, in his endeavours to escape from the imputation of such his former crime, there may be this or that one so ill-contrived as to be susceptible of the clearest refutation.

It gives to man, weak, frail, sinful, wicked man—it gives to man *pro tanto* (so he be but clothed in temporal authority) the command, the absolute command, over a proportionable part of God's power—applicable to the worst, as easily as to the best of purposes. It makes man the master, God his servant: and not his servant only, but his slave: his slave bound to a degree of unerring obedience, such as no human master ever received, or could have received, from any slave.

Attach to the ceremony, and thence to the profanation of it, but the smallest particle of punishment, and that particle inseparable; then has every man a sure recipe for binding himself, and any such other man as the influence of a moment can put into his power for this purpose,—for binding them, with a force proportioned to the quantum of this particle, to the commission of all imaginable crimes: then has man, by grant from God himself, a power over God, applicable at any time to the purpose of converting God himself into an accomplice of all those crimes.

Let this be the supposition built upon, then would Jephthah, by the amount of this inseparable particle,—then would Jephthah, had he spared his daughter, been punished by God's power: punished, not for the taking of the rash vow, but for the breaking of it.

Then would the assassin of Henry IV., (punished, or not punished for making the attempt), have been punished, and by divine vengeance, had he refrained from making it.

Assassination, assassination through motives of piety, is the natural,—in case of consistency

the necessary, and as history testifies, the too frequent,—fruit of the popular persuasion relative to the nature and effect of oaths.

It was in the earliest stages of society—in those stages at which the powers of the human understanding were at the weakest—that this, together with so many other articles in the list of supernatural securities, or substitutes for testimonial veracity, took their rise. Ordeals, in all their forms: trials by battle: trials without evidence (understand human evidence): trials by supernatural, to the exclusion of human, evidence: trials by evidence secured against mendacity by supernatural means—by the ceremony of an oath.

As the powers of the human understanding gain strength, invigorated by nourishment and exercise,—the natural securities rise in value, the supernatural, understood to be what they are, drop, one after another, off the stage. First went ordeal: then went duel: after that, went, under the name of the wager of law, the ceremony of an oath in its pure state, unpropelled by that support which this inefficient security receives at present from those efficient ones which are still clogged with it: by and bye, its rottenness standing confessed, it will perish off the human stage: and this last of the train of supernatural powers, *ultima cœlicolum*, will be gathered, with Astrea, into its native skies.

The lights, which at that time of day were sought for in vain from supernatural interference, are now collected and applied, by a watchful attention to the probative force of circumstantial evidence, and a skilful application of the scrutinising force of cross-examination.

**SECTION IV.—*How to adapt the ceremony, if employed, to its purposes.***

Objectionable as the ceremony of an oath, considered in the light of a security for the trustworthiness of testimony, has appeared to us to be; still, if it is to be applied to that purpose, it cannot be a matter of indifference to know in what way the little efficiency which it possesses may be made as great as possible.

An oath acts in three ways: it carries with it the operation of three different sanctions. Of the religious sanction, from its nature and essence; of the legal sanction, whenever punishment has been attached to the profanation of the ceremony, as such; of the moral or popular sanction, because that which points the force of the legal sanction upon any object, generally points at the same time the force of the moral sanction, and brings to bear the punishment issuing from that source, also.

Suitable to the nature of the three different sanctions concerned, will be the arrangements calculated to raise to its maximum the salutary agency of the ceremony, as applied to the purpose in hand. The practical utility of introducing into practice this or that particular arrangement on the occasion in question, will depend so much upon the state of public opinion in each respective country—upon the prejudices, and humours, and caprices, of the people and their rulers,—that the hints which follow on the subject cannot be adapted to any other purpose than that of illustration. For that purpose, a concise (and as it were) short-

*hand* mention of them will be sufficient, without attempting to enter into details, distinctions, modifications, or justifications.

I. Arrangements for adapting the ceremony of the oath to the purpose of pointing the force of the *religious* sanction.

1. Form of words, appropriate and impressive.\*

2. Different forms of words, rising one above another in solemnity and impressiveness; partly according to the importance of the occasion, as measured by the mischievousness of the offence, according to the modifications above

\* To show how much in this case may depend on form, when in substance the ceremony is the same; I have heard at different times many more instances than I can recollect of the importance attached to particular forms among seafaring men and other individuals belonging to the unlettered classes: forms not established, but cast by chance in each man's particular imagination. Say, you wish your tongue may rot off—say, you wish your eyes may drop out of your head this moment,—if you ever saw any such thing. By an adjuration in some such form, or varying from it by some whimsical embroidery which I have now forgotten, and which, if remembered, it might perhaps not be decent to repeat, has a man been made to bring out some truth, which, till then, he had masked by a profusion of false protestations, uttered without scruple; and which could not have been extracted from him by all the force that could have been brought to bear upon him in a court of justice.

Unfortunately, illustration is the only purpose that can be answered by this observation. The comparative impressiveness of each such formulary depending upon the inscrutable texture of individual idiosyncrasy, it can never be applied to any judicial purpose; unless possibly at the suggestion of a party, apprised by habitual intercourse of his adversary's state of mind in this respect: in which case, however, it would always be to be *added* (since it could never on sufficient assurance be *substituted*) to the regular oath.

exhibited ; partly according to the apprehension of falsehood, excited by the individual circumstances of the case in the bosom of the judge.\*

3. On occasions of superior importance, attitudes and gestures directed to the same end : lifting up the hands and eyes to heaven,† &c.

4. Appropriate graphical exhibitions, constituting in this view a regular part of the furniture of every court of justice. Copy, in painting or engraving, of the death of Ananias and Sapphira (capitally punished on the spot by divine justice, for mendacious testimony of the self-

\* With a view to solemnity and impressiveness, the choice of a formulary is matter of no small difficulty. It is exposed to this dilemma. Employ the same form on all occasions, the most trifling as well as the most important,— applied to the most important, it fails of being so impressive as it might be; or else, when applied to the least important, it sounds bombast and ridiculous. Employ divers forms, rising one above another in impressiveness,—then comes another danger: on the occasions on which any form short of the most impressive is employed, the witness, knowing that there is another which is regarded as more efficacious, may conceive lightly of that which, on the occasion in question, is tendered to him, and regard it as wanting in some particular which is necessary to endow it with a completely binding force.

The only effectual remedy would be, not to employ the ceremony at all, or, if at all, only on the most important occasions.

The following might be two of the gradations :—

The evidence I { am about to give, shall be } the truth, the whole truth, and nothing but the truth.

If, in any part of the testimony I { have been giving, } I knowingly utter anything that is false, or in any respect conceal, disguise, or misrepresent the truth, I acknowledge myself to be deserving of the wrath of Almighty God, and of the contempt and abhorrence of all mankind.

+ Scotch covenanter's oath.

*investigative or self-exonerative kind), a subject treated by Raphael in one of his cartoons. Over the picture or print, explanations and applications, in characters legible to all spectators.*

5. Other appropriate exhortations and observations taken from scripture.

6. The oath administered, not by a lay-officer of the court, but by a minister of the established religion.\* On extraordinary occasions,

\* On the ground of English law,—if the faculties possessed by ecclesiastical functionaries were not, by a sort of mutual (though tacit) understanding, set down among the sorts of talents better kept under the napkin than drawn out for use,—the application might be made of this principle in a variety of obvious instances:—

1. In a bench of justices of the peace, sitting in general sessions, it seldom happens but that one or more clergymen are spontaneously present. In this case, the principle might be applied, without the smallest additional trouble or expense.

2. At the assizes, it scarcely ever happens but that one or more of the neighbouring clergy are present, drawn by curiosity or business.

3. At the Old Bailey, in the intervals of meals, might not the Lord Mayor's chaplain be as suitably and profitably employed in this line of serious service, as in saying grace before and after meat at the Mansion House? As a simple spectator, the Ordinary of Newgate is often present.

4. In Westminster Hall, of the five chiefs, three are commonly members of the House of Lords, and in that character give title (if not occupation) each of them to a certain number of chaplains. Might not these, with or without the assistance of other such labourers in the sacred vineyard, suffice amongst them for the discharge of a function so well assort to their other functions? At whatever price the labour was estimated, the chief judge of the chief court of equity has in his hands assets singularly well adapted to the purpose of affording it its reward.

5. In the House of Commons, the Speaker has a chaplain, whose duty consists in offering up prayers and thanksgiv-

(the witness professing a religion other than the established)—power to the judge to call in the assistance of a minister of the witness's own religion, for the purpose. On occasions of extraordinary importance, prayer by the minister, short but appropriate.

II. Arrangements for adapting the ceremony, on extraordinary occasions, to the purpose of pointing the force of the *political* sanction.

1. In front of the station of the witness, as he stands up to deliver his evidence,—a table, in characters large enough to be read from every part of the court, stating the punishment for perjury, according to its various gradations. While the witness is pronouncing the oath, an officer of the court, with a wand, points to the particular modification of punishment attached to the particular modification of perjury, which on the occasion in question, would, in case of menda-

city, be incurred.\*

ings, which, happily for his congregation, they are not obliged to join in. Might not his time be employed to rather more advantage, in giving solemnity to the oaths administered to witnesses before committees?

6. In the ecclesiastical establishment, for the greater advancement of piety and religion, are contained (as everybody knows) in no inconsiderable number, dignities and other benefices, composed of reward altogether pure from service. Would the reward be less profitably bestowed, if service, in this or some other shape, were attached to it?

Among our Saxon ancestors, in the county courts, (at that time competent, as they should never have ceased to be, to all sorts of causes), the minister of justice never sat without the minister of religion at his elbow.

\* The institution of binding a man to his good behaviour, by obliging him (in the language of English law) to enter into a recognizance, bears, in one respect, an analogy to this arrangement. Considered on the mere footing of a contract,

2. On extraordinary occasions, (for example, when the temptation or the proneness to mendacity is apprehended to be particularly great, and, at the same time, the cause important), a curtain draws up, and discovers a graphical exhibition, representing a convict suffering the characteristic punishment for perjury, whatsoever it be. The officer, with his wand, directs the attention of the witness to it, as above.

### III. Arrangements for adapting the ceremony to the purpose of pointing the force of the *moral* sanction.

1. In the wording of the oath, express and distinct reference made to the punishment from this source, as well as from the religious. In the event of mendacity, the witness recognizes himself as about to incur, and as meriting to incur, the contempt, or (according to the nature of the case) the abhorrence, of all good men.\*

an engagement, an agreement,—so far as the cognizor himself is concerned, and without adverting to the persons joining with him in the obligation in the character of sureties, the operation is useless and nugatory: to what end employ the compulsive force of law, to engage a man to consent to submit to an eventual obligation, which it would be just as easy to impose upon him without such forced consent, as with it? The only real use of the instrument is to fix the penal sum which, on the deprecated event in question, a man will have to pay; and to notify to him the amount of it.

\* A very few words indeed, well chosen and well placed, will be sufficient. There is no sort of incompatibility between the one object and the other. Among men not under the influence of religion, an oath bearing reference to religion and nothing else, is in danger of losing the whole, or a great part, of that respect, which might be secured to it by a prudent attention to their opinions. All men ought

2. In case of suspicion of falsehood (whether arising from extraneous contradiction, from self-contradiction, from inconsistency, or improbability), but without ground sufficient for prosecution ; the publication of this particular part of the evidence in the newspapers, authorized, encouraged, or ordered, by the judge : warning given of this arrangement to the witness at the time. Concerning the publicity to be given to judicial examination in general, see a subsequent chapter of this book.\*

3. To this head may likewise be referred the several arrangements exhibited under the two former heads. Whatever discourses and exhibitions are addressed in this way to the witness, make their way at the same time to the public at large, and through that channel (circuitous as it is) are reverberated upon him with augmented force.

Preach to the eye, if you would preach with efficacy. By that organ, through the medium of the imagination, the judgment of the bulk of mankind may be led and moulded almost at pleasure. As puppets in the hand of the showman, so would men be in the hand of the legislator, who, to the science proper to his function, should

to be under the influence of religion—therefore, whether they are or no, we ought to deal with them as if they were—is a most deplorably self-deceiving, though unhappily but too frequent, logic. But deplorable would be a man's own error—deplorable the misfortunes of his subjects—if, on any practical occasion, any such assumption, any conceit thus hatched, should be taken up by him in the capacity of a legislator, and acted upon as a ground for any of his measures.

\* Chap. 10.

add a well-informed attention to stage effect. Unhappily, among the abundantly diversified shapes in which severity has displayed itself in penal exhibitions, scarce the faintest trace of ingenuity is any where to be found. No marks of any progress made in the study of human nature: no sign of any skill, or so much as thought, displayed in the adaptation of means to ends. Ends are scarce so much as looked at. Blind antipathy is the spur; blind practice the only guide. To do (though it be to fail) as others have done before him, is each man's only aim, is each man's highest praise.

Next (if not superior) in importance, to the study of augmenting the efficacy of the ceremony by these corroborative circumstances and accompaniments, is the attention not to spend its force upon the air—not to consume it upon inadequate objects—nor to debilitate it and bring it into contempt, by employing it upon occasions in which its utter inefficacy is demonstrated by experience: not to persevere in employing it in the character of a security for veracity, in cases where mendacity is the constant and notorious result.

The following are such further rules, as may with advantage be observed in the wording and administering of the oath:

*Rule 1.* Let the words of the oath be pronounced by the witness himself: not simply heard, and tacitly assented to, as they issue from the mouth of a third person—such as the person by whom the oath is said to be administered.

*Reasons.* 1. A ceremony—a discourse—will naturally appear to a man to be the more unequivocally and indisputably his own, the more

active the part is which he takes in it. Whatever issues out of a man's own mouth, will naturally appear to him to be more completely his own, than what he silently hears while spoken by another. Silence, says the proverb, gives consent: true: but not so clear and unequivocal a consent as is given by direct speech. Where the inclination is reluctant, nothing more inventive than the imagination: nothing more flimsy than the subterfuges which it will make or catch at. I did not hear: I did not attend: I did not comprehend: no excuses too weak for a man to pass upon himself, howsoever it be with others. What you yourself pronounced, you cannot but have heard: what you yourself pronounced, you cannot but have attended to: what you yourself pronounced, you cannot but have comprehended: it being that sort of proposition, which a man cannot fail of comprehending, so he have but given it that measure of attention, without which he could not have pronounced it. Such are the bars which the voice of conscience, or of any monitor from without, has to oppose to the propensity to evasion in the case of audible enunciation, but not in the case of silent auditorship.

2.—Any denunciation of infamy, though it be but eventual and hypothetical, is reflected upon a man in a more forcible manner, when the mouth from which it is known to have issued is his own. “Thy own mouth condemneth thee, not I.”\*—“Out of thy own mouth will I judge thee.”†

\* Job xv, 6.

† Luke xix, 22.

*Rule 2.*—In the words which the witness pronounces, the verbs and pronouns should be in the first person, *I swear*, *I declare*, and so forth.

*Reason.*—This feature in the oath is necessary to give complete fulfilment to the intention expressed in the rule last preceding; to raise to its maximum the force of the inflicted infamy; to raise to its maximum the force of the impression made by the oath upon the mind of him who takes it.

This form, though not only the most opposite but the most natural, is not however so necessary as to render the opposite form without example. The form, in which the judgment eventually passed upon the conduct of the witness, and pronounced by the witness, is expressed, may be that of a judgment passed upon it, not by himself, but by others, viz. the authors of the disposition of law, by which the oath is instituted.

*Rule 3.*—The form should be as concise, as is consistent with the preceding rules.

*Reasons.* 1.—In proportion as a discourse is drawn into length, especially if without material addition to the ideas conveyed by it, the impression made by it is weakened.

2.—Where witnesses are numerous, (especially where the time allowed for the examination is limited and scanty), the time consumed in this way may be a material object, in respect of vexation, expense and delay; and at any rate, in respect of the time consumed on the part of the judge.

**SECTION V.—*Oaths, how applied as a security for the trustworthiness of testimony, under past and present systems of law.***

Under the original Roman law, the ceremony of an oath (as already mentioned\*) does not appear to have been employed in general on the occasion, nor consequently for the purpose, of adding to the securities for the truth of testimony. Not extending in general to what are commonly called assertory declarations, it must have been, for the most part, confined to those occasions on which it has been distinguished by the appellation of a promissory oath.

At one period or other, on here and there an occasion, the ceremony does indeed appear to have been employed for this purpose. But if the intention was really sincere, so shallow was the conception, so clumsy the manipulation, that the interests of truth seem upon the whole rather to have suffered by it, than to have been served.

An oath, in so far as a breach of the engagement is exposed to detection, operates, it is true, as a check to mendacity. But, if the breach of it is entirely covered from detection, it operates,—in here and there a mind of more than common delicacy, as a check to mendacity,—but on minds of vulgar mould, rather as an encouragement. By presenting a colour of efficiency to a check which in reality

\* See last chapter, section 3.

amounts to nothing, it furnishes a certificate of veracity to any liar who thinks fit to apply it to that use. It gives him credit for virtue which he does not possess ; secures to him all the profit of mendacity without any of the risk ; and enables him to combine the benefits of mendacity with the reputation of the opposite virtue. When, by the tie of so awful a sanction, a man is bound to the observance of the laws of truth ; can you, without a violation of the law of charity, refuse to take him at his word ? Such, on these occasions, is the joint cry of the hypocrite and the dupe.

In case of falsity, the testimony given by a man is the more thoroughly exposed to detection,—in the first place, the more particular and circumstantial it is at the first delivery ; in the next place, the more completely it is subjected to the test of cross-examination. Remove this test, you already grant to mendacity a sort of half-license. But if, instead of calling upon a man for particulars, you admit of a declaration in general terms ; nothing is more easy, more natural, or more common, than, by the generality of those terms, to render the license complete.

Such, at any rate, is the effect. More than one cause (speaking of psychological causes) may any of them have been adequate to the production of it. In some instances, fraud : the futility of the remedy being understood by the hand that administered it. In other instances, honest imbecility : the prescriber being himself a believer in the efficacy of his own quack medicine.

In what, if in any, cases, the general declaration has been *substituted* to particular statement, such as would naturally be extracted by examination,—in what cases, if in any, *super-added*,—does not appear clearly, on the face of such reports as are before me. What seems probable is, that the reporter himself had no clear conception of the difference: what seems equally probable is, that the judges, whose practice he has in view, had not themselves any clear conception of the difference. Sometimes the one course may have been pursued, sometimes the other, according to the occasion, and the object (public or private, good or bad) that happened to have been principally in view. Substitution would be suggested by indolence or favour: addition, by despair and lassitude. In the latter case, the judge stands in the predicament of the miser Harpagon, in Molière: after searching till he was tired, and finding nothing on the supposed thief—"Rends moi," says he, "sans te fouiller, ce que tu m'as volé."

Among the Romanists, the following present themselves as the principal instances in which this sort of mock security appears to have been employed.

I. The *juramentum expurgatorium*. The sort of case here is a criminal one. The process of examination must have been already undergone: for to employ it, was the constant practice in these cases. The evidence thus extracted was found insufficient: it was so, even with the addition of the extraneous evidence. Had an oath been administered before

the examination? then to what use repeat it afterwards? Had no oath been administered at that stage? then why discard it at a time at which (if at any) it might have been useful, reserving it for a time at which all chance of its being useful was at an end?

2. The *juramentum suppletorium*. The case is here a non-penal one. The plaintiff, for example, demands a debt. The extraneous evidence he produces is deemed insufficient. To supply the deficiency, he is admitted as witness in his own behalf: but on what terms? Not on the terms of submitting to examination, like an extraneous witness,—but on the terms of repeating, in general words, what in general words he had said before. Of so untrustworthy a sort is the testimony, that, so long as any other is to be had, it is not to be received at all: this same untrustworthy evidence, when it is received, is to be received free from those essential checks, which, in the case of the most trustworthy witnesses, are deemed indispensable.

3. The *oath of calumny*: placed by Bishop Halifax at the head of those arrangements the object of which was to restrain what he calls temerity (he should have said *mala fides*) on the part of litigants. I believe my cause is a good one,—says the suitor, plaintiff or defendant. To a suitor by whom these words have been pronounced, what judge can be so uncharitable as to impute any but the purest wishes and the purest motives? By these words, as surely as by a talisman, everything that savours of temerity is to be restrained.

What grounds have you for looking upon your cause to be a good one?—a question of that sort would have been too dangerous: a customer who could not answer it, might every now and then be driven from the shop: the *officina justitiae*, as Blackstone so truly calls it.

On the *viva voce* examination of a witness, the form observed in English procedure, on the occasion of a trial before a jury, is as follows. An officer of the court, having put into the hand of the witness a book containing the Christian scriptures (viz. that part which is purely Christian, the New Testament—or, in case of a Jew, that part of the Christian scriptures which is recognized in common by Jews and Christians—the Old Testament)—addresses himself to the witness, and says to him as follows:—The evidence you shall give on the issue joined between our sovereign lord the king and the defendant; or, the prisoner at the bar; or, the parties; shall be the truth, the whole truth, and nothing but the truth—so help you God.—The witness thereupon, either of his own accord or at the suggestion of the officer, puts his lips to the book: and then, and not till then, the oath is considered as having been taken.

As to the description of the testimonial duty, it seems happily enough imagined. Comprehensiveness, conciseness, and emphaticalness, are qualities, the praise of which seems to be justly merited by it. Of the three members of the clause, “the truth,” “the whole truth,” and “nothing but the truth,” the sense might perhaps be conveyed by the two last, without the first. But so useful is the first for filling the period, and strengthening the impression made upon

the mind through the medium of the ear, that, supposing it omitted, the force of the phrase can scarcely but appear to have sustained a considerable loss. Instead of being considered as an additament purely superfluous, the general expression *the truth* may be considered as containing in itself the whole of the sense: in which case, the two other members may be considered as added by way of exposition; lest, for want of sufficient particularity, either of the ideas, (in particular that of integrality), should fail of presenting itself to notice.

In other respects, if the above rules be considered as affording a proper test, the above exhibited formulary seems ill qualified to abide it. So far as enunciation goes, the witness is purely passive: he is a hearer only, not a speaker, though in a concern so much his own. Not speaking at all, the rule which requires him to speak in the first person is unobserved of course. The kissing of the book is an exhibition altogether vague and inapposite. If it be understood to convey an expression of respect, there is nothing to direct it to any object beyond the book: if it contain an expression of respect for the book, and the objects from which it derives its title to respect, it bears not any express assurance of the veracity of the statement about to be delivered.

Considered as an instrument for calling in the force of the religious sanction for the purpose of binding the witness to the observance of his duty, the phrase *So help you God* seems but very feeble and inadequate. It contains an allusion to God's favour, but scarce the faintest allusion to God's wrath. It brings good alone

to view, not evil : reward, not punishment. It holds up to the witness the prospect of a sort of special grace, an extraordinary and unknown reward, to be hoped for by him in the one event ; but is silent as to reprobation and punishment, in the other. The worst that is represented as about to befall him in any event—in the event of his defiling himself with the crime of perjury,—is the failure of this special grace : a sort of acquisition, the idea of which not having been ever stamped upon his mind, the apprehension of missing it is not of the number of those by which sensible and serious alarms are wont to be excited. What salutary terror can be expected to be excited in the mind, by the faint and altogether oblique intimation of a possible loss, of which neither the value, nor so much as the nature, has, in any perceptible degree, been ever present to a man's mind ? If a working man (and of such is the bulk of the species) has a burthen to raise, and wants help to lift it, whom has he been used to look to ?—not God, but his next neighbour.

In the Danish law, no great value appears to be set upon the judge's time. In causes of a certain degree of importance, each witness, before or after he takes the oath, is to hear what is called an "exposition" of it, extending to the length of three quarto pages ; an expense of time the more wanton, inasmuch as this dissertation is to be kept constantly exposed to view, in every court of justice.\*

According to the Danish code, a witness swears with his fingers : the thumb and the two

\* Code Dan. l. 1. cap. xiii. § 8. p. 58.

next being held up together, one for each person of the Trinity.\*

Of this sort of theology, observe the moral consequence. If murder or incendiarism (for example) be committed in presence of Arians or Socinians in any number, and of no others, (not to speak of Jews), either the crime is to go unpunished, or the witness is to be duly plagued in form of law, till he submit to swear against his conscience.

In case of perjury, besides forfeiture of all forfeitable property, the witness is to lose two fingers : two of the three offending fingers, it seems natural to suppose ; and thus far analogy seems to have been consulted. Pity an equal regard had not been shewn to economy, not to speak of humanity and common sense. The convict, if not already a pauper, was to be converted into one by the forfeiture ; and, by the same sentence, his means of livelihood were to be cut off.

As to the punishment of the religious sanction, if any particulars are desired concerning it, reference may be made to the Hindoo code, and to the Danish code.

In respect of quality, the Hindoo code does not afford us much information : in respect of quantity, it is precise to admiration. The misfortune is, every quantity is relative : and what the correlative is, is not explained.

If the subject be a cow, (whether the cause be penal or non-penal is not specified), the guilt of perjury is equal to that of the murder of exactly ten persons : if a horse, guilt equal to one

\* Expositio Juramenti, p. 545.

hundred murders: if a man, one thousand murders: if a piece of gold, the number of murdered persons on the other side of the equation is rather difficult to reckon: it is equal to all the men that ever were born; *plus* all that ever will be.

“If the affair be concerning land,” the ratio of this lot of guilt to the preceding one, seems rather difficult to measure: it is that of the murder of all the creatures of all sorts living in the world; but at what period is not specified.

Another difficulty turns upon the distinction between an animal having hair upon its tail, and an animal having none: in the former case, (kine and horses excepted as above), the number of murders, to the guilt of which that of the perjury is equal, is exactly five: when the tail has no hair upon it, the degree of guilt is left to be discovered by the faint light of human reason.

For exculpative perjury (at least for self-exculpative), when the punishment is capital, there is an express licence: a few cases of particular atrocity excepted, such as the cases of murdering a cow, or drinking wine:<sup>\*</sup> and, for the encouragement of marriage, three or four falsehoods may be told, to promote so laudable an end. At the same time, so much better a thing is gallantry without marriage, than marriage itself, that in the former case the quantity of “falsehood” pronounced “allowable” is unlimited.<sup>†</sup>

In the Danish code, the punishment of the religious sanction says nothing of proportions,

\* Halhed’s Code of Gentoo Law, pp. 129, 130.

† Ibid. p. 130. See above, p. 236.

and seems to have but one and the same lot for all offences: whatever be the unhappy occasion; men, land, horses, gold, animals without hair upon their tails, or cows. In respect of quality, it furnishes considerable information. Besides being excluded for ever from the company of the inhabitants of heaven, with the three persons of the Trinity at their head—a privilege the loss of which might, by want of the experienced enjoyment, have been rendered the more tolerable; besides this, together with a variety of other negative punishments of the same complexion; the perjurer's body and soul are to stand devoted to Satan and his crew (who, for the occasion, are loaded with sad epithets), and with them, in the depth of Erebus, are to be surrounded and tossed about in everlasting and unextinguishable fire, always consuming, never liberated. Another punishment which, in case of perjury, the witness is to be understood to wish for, is one that is to be borne, not by himself immediately, but by his cattle. They are not to be roasted, like their master, in Erebus, but to pine away upon earth, and be emaciated, till they have lost their value. Such, it is explained, is to be his wish: but as to the cattle, whether the wish is to be accomplished, is not stated.

By the Swedish law, if the letter of it is to be depended upon; be the cause what it may—in a cause of property, be the value in dispute what it may,—every man is at liberty to perjure himself for forty dollars: a sum considerably less than the ten pounds, which, in English equity law, is deemed so very a trifle, as not to be worth restoring to a man who is un-

justly deprived of it. One would think that all the absurdity in human nature had crowded itself into the department of science in which the demand for intelligence is the most urgent.

In the same code, the oath, though little more than a tenth of the length of the Danish explication, is still too long for ordinary occasions. It occupies a dozen quarto lines.\* No written exposition here, as, on extraordinary occasions, in the Danish code: but, whatever be the occasion, the witness is condemned to hear, and the judge to pronounce, on the subject of it, an *extempore* admonition, which may be of any length. Much scope for eloquence is not indeed afforded to the sermon, where the text is no more than forty dollars. The pain of being *intestabilis* (whatever be meant by *intestabilis*) will not make any very efficient addition to the dollars: if the privilege from which a man is debarred, be the making of a will, the terror will not be very great where he has nothing to leave, or is satisfied with the will that the law has made for him: if it be that of serving again as a witness, it is so much trouble saved, the only inconvenience being to a possible somebody else whom he does not care about: unless the case be his own; and then the exclusion may cost him his life.

**SECTION VI.—Should an oath, if employed in other cases, be employed or not on the examination of a defendant in penal?**

When a defendant, in a cause of a penal nature, is examined; in other words, where the

\* Page 364.

testimony extracted or received is of the self-regarding kind, and, in the event of conviction, self-disserving, and self-convicting; shall an oath be administered to him or not? If not, then the security thus afforded for veracity is left unemployed: and in what cases?—in those in which the discovery of the truth is of most importance. If the ceremony be extended to these cases, then comes a hardship, which, to some eyes, may be apt to appear so tremendous as to be intolerable. In case of perjury, the suffering, being supernatural, may be infinite; while, in case of delinquency, such is the frailty of human nature, more particularly in so guilty a bosom, that the temptation to incur this infinite punishment may be irresistible.

Another difficulty. Suppose it desirable, that, under such circumstances, a defendant should take the oath: what if he refuse? Acquiesce in the refusal, the security is lost: lost to the most important class of causes. Refuse to acquiesce in the refusal, what resource is there for compelling it? To endeavour to compel it, is but in other words to employ torture. But admitting torture to be a warrantable expedient in any case, is this a case in which to employ it?

Not to pursue, as it were in a parenthesis, an inquiry of such intricacy; a solution for the difficulty presents itself, and such a one as seems equally simple and unexceptionable. Tender the oath: if he accepts it, swear him: if he declines it, do not attempt to force him, but warn him of the inference. From a refusal to take the oath (particular religious persuasions excepted) the inference—an inference which, at

the suggestion of common sense, every man will draw immediately,—is exactly the same as that which would be drawn from non-responsion under the oath, or from non-responsion on an occasion of an extrajudicial nature, and which accordingly admits not of an oath.

This course seems to be equally advantageous, whether guilt be supposed or innocence. In case of innocence, all objection vanishes: being innocent, a man embraces with alacrity this as well as every other means of impressing the court with the persuasion of his innocence. In case of guilt, if he declines taking the oath, a species of circumstantial evidence operating in proof of the guilt, a sort of evidence tantamount to non-responsion, is thus obtained: if, notwithstanding his guilt, and thence his consciousness of guilt, he takes the oath—takes it in the view of avoiding to bring to bear against himself that species of circumstantial discriminative evidence,—a result more or less probable is, that, to the symptoms of perturbation produced in his deportment by the apprehension of the legal punishment which he has incurred, may be added those of an ulterior degree of perturbation, produced by the contemplation of the guilt of perjury.

Will it again be said—still you ought not thus to lay snares for consciences; it is cruel, for any temporal advantage, thus to subject a sinful soul to so serious an addition to its guilt? If this reasoning were conclusive, you should abstain from the use of this security altogether: in cases non-penal, as well as penal; in the case of extraneous, as well as in

that of self-regarding, testimony; wherever you saw a man determined, as you thought, to commit perjury, this security for veracity ought, in that instance, to be laid aside: the more hardened and determined in mendacity a man were, the more safe.

The mischievous consequences that would ensue from the notion that the profanation of the ceremony were accompanied with any guilt, moral or religious, over and above whatever may be attached to the mendacity by which the profanation is effected, have been already stated: together with the radical incongruity and inconsistency attached to the notion of a frail and weak being, such as a man, disposing, at his pleasure, of the power of a Being all-powerful and all-wise. If the conclusion be just, the above objection, respecting the peril of future supernatural punishment, falls to the ground.

At any rate, the objection can never come with any tolerable consistency or grace from the lips of any one by whom the application made of this ceremony to the function of a juryman, on the occasion of an English trial, is approved. An oath, forced into the mouth of twelve such judges, to oblige them to declare their real opinion; and torture applied to force some number of them, in case of diversity of opinion, to declare (each of them) that to be his opinion which is not! a mode of judicature so contrived that it could not go on, unless the judges, in unknown numbers, were continually forced by torture into perjury!

True it is, that the incongruity of one such

practice does not give congruity to another: but if, for fashion's sake, a certain quantity of perjury must at all events be preserved, better preserve a sort which is of some use, than a sort which is as useless, as in every other point of view it is incongruous.

## CHAPTER VII.

### OF SHAME, CONSIDERED AS A SECURITY FOR THE TRUSTWORTHINESS OF TESTIMONY.

SHAME may be considered as operating in the character of a security for trustworthiness in testimony, in so far as, on the occasion of a man's delivering testimony, the contempt or ill-will of any person or persons is understood to attach, or apprehended as being about to attach, upon a deviation, on his part, from the line of truth.

Shame, it is but too evident, in the character of a principle of action, cannot, upon all occasions, be relied upon as a sufficient security, without the aid of legal punishment. Some men are below shame: some men are above it. Power will, in some situations, place a man above shame. In England, however, power is hardly sufficient to place a man above shame, without a pedestal of false science. In England, a king, were he ever so much inclined, could scarce dare to deliver a notorious falsehood from the throne. In the same country, however, no judge (I except always the judges for the time being) ever yet feared to deliver from the bench notorious falsehoods, under the

name of fictions (and the whole system of common law procedure is made up of fiction)—or to suborn jurymen to deliver falsehoods not less notorious, and aggravated into perjury.

Happily however for mankind, shame, in this its character of a security for trustworthiness, is not altogether without its influence on uncorrupted minds : I mean on minds which, howsoever it may be in respect of corruption from other sources, have not the misfortune to be exposed to that corruption which is poured down in such torrents from the heights of English judicature.

In the Danish courts of justice denominated *Reconciliation Offices*, oath is out of the question, punishment is out of the question, truth has no other support than the sentiment of shame. Yet, strange to tell ; strange at any rate to an English ear ; more causes in that country are determined in these courts, from which the professional lawyer is excluded, than in all the courts put together in which the system of technical procedure, with its apparatus of oaths and punishments, bears sway.

Even in England, cases, in which the only punishment that bears upon the case is that which consists in shame, are neither unknown to lawyers, nor unheeded by the legislature. Awards, for the correctness and completeness of the testimony on which they are grounded, have nothing else to trust to : and by an act of the legislature,\* the power of the regular tribunals is applied to the giving force to these decisions ; decisions pronounced by judges,

\* 9 and 10 W. 3. c. 15. Anno 1698.

learned or unlearned; constituted by the joint choice of the parties.\*

The force of the moral sanction, as applied to this purpose, is a most commodious and valuable supplement to that of the political. It condemns upon less evidence: it inflicts a punishment *pro more probationum*, reduced in intensity in proportion to the faintness of the evidence: it admits of a middle course between condemnation and acquittal,—an expedient which in general cannot be, or at least is not usually, resorted to by the punishment of the political sanction, as applied by judicial procedure: upon the appearance of fresh lights, it is able without difficulty to divest itself of any such undecided character, and either fill up the measure of its punishment, or strike it off altogether, according to the complexion of the case.

Much of that which appears to be done by fear of punishment alone, is really done by fear of shame: a fear which, howsoever backed and strengthened by fear of punishment, would not of itself have been by any means without effect.

In the course of this work, we shall have but too frequent occasion to observe the debility that has been introduced into the constitution of the political sanction by the rashness that

\* If, previously to any regular application to a technically proceeding tribunal, a plaintiff were obliged to address his demands in the first instance to a tribunal proceeding in the mode indicated by natural justice, these arbitration courts would, in that respect, coincide in their nature with the Danish Reconciliation Offices. But these occasional arbitration courts not having existence but by the joint act of both parties, such coincidence is impossible.

has given birth to the established rules of evidence. In these cases, the force of the moral sanction—the force of public opinion—steps in, and supplies to a certain degree (however incompletely) the place of that force which, by the unskilfulness of the commanders, has thus been rendered unserviceable. It prevents nominal and apparent impunity, from being altogether equivalent to real; and helps to moderate, when it does not do away entirely, the triumph of successful guilt.

When accused for the purpose of punishment, a delinquent, in escaping from punishment, does not always escape from shame. Judges, when, by their quibbles—statesmen, when, by their intrigues with judges—they save a man from merited punishment, do not always save him from shame. Judge and Co. in selling exemption from punishment,\* and thus far impunity, do not, cannot, (where evidence is heard, and not excluded by other quibbles), sell exemption from shame.

To the efficiency of this security, unhappily the limits are but too apparent. Shame, to constitute on this occasion an adequate succedaneum to legal punishment, supposes on the part of the deponent a certain degree of moral sensibility; a certain degree of probity. But, be that degree what it may, the cases in which the demand for coercive judicature is the most urgent, are those in which no such degree of probity is to be found.

On this as on every other occasion, the influence of shame depends in no small degree

\* Vide *infra*, Book VIII. TECHNICAL PROCEDURE, Chap. 14. *Nullification*.

upon mutual presence: upon the interchange of the language of the eye, between those on whose part the contempt and ill-will is apprehended, and him in whose breast the apprehension of those sources of incalculable affliction is excited.

On this account, the influence of shame is attached, in no small degree, to that mode of collection in which the testimony is delivered *vivæ voce*—delivered by the deponent in the presence, if not of the adversary, at any rate of a judge, or (what is most usual) an assembly of judges, with his or their ministerial officers and subordinates.

Accordingly, in the procedure of the Danish Reconciliation Courts, this mode of delivery is an essential feature: on the part of the party, or (what comes to the same thing) a non-professional substitute by whose acts and words he is bound,—personal appearance,—not sham personal appearance, as at the English regular courts, but real personal appearance, attendance, (by what words shall the idea be conveyed to the mind of an English lawyer?)—is an indispensable requisite.

The natural securities for trustworthiness in testimony have been adverted to in the preceding book\*: and, of these, that, for the designation of which the word *shame* is here employed, was one. In the present book, this same principle of action has been comprised in the list of factitious instituted securities. Why? Because to this security, standing by itself, no inconsiderable part of the business of factitious

\* Book I, Chap. 11. *Moral causes of correctness and completeness.*

judicature hath, as we have seen, been entrusted: because, in the instance of the Danish Reconciliation Courts, the admission of this security, to the exclusion of factitious punishment, required and called forth a positive act of the Danish legislature: and because the choice of that mode of testification, on which the efficacy of this principle of action in so great a degree depends, is another positive institution, in the establishment of which the will of the sovereign must take an active part.

When punishment, factitious punishment, to be attached to the species of delinquency in question by an express act of will to be exercised by the legislator, was the principle of action in question,—rules were found necessary to be brought to view, for the purpose of guiding the application of it: rules, the demand for which, on this occasion as on others, had been created by non-observance. The legislator, on this as on so many other occasions, acting under the guidance of hands engaged by interest to mislead him, has on this, as on so many other occasions, acted in continual opposition to the dictates of utility and justice.

The public, whose finger, on this as on so many occasions, the power of shame is in the habit of following, with a degree of obsequiousness such as it knows better than to bestow upon the “finger of the law;”—the public, in its application of the principle of shame to the subject in question, (in so far as the force of that principle is at its disposal), is already in the habit of following those same rules, which, for the direction of the force of legal punishment, it became necessary, as above, to bring to view.

1. Applied to falsehood in the shape of testimony, punishment (says one of these rules) should attach upon temerity, as well as upon mendacity. And so, under the dispensation of the tribunal of public opinion, does the punishment of shame: making the proper distinction between the degrees of delinquency in the two cases.

2. Applied to falsehood in the shape of testimony, punishment (says another of these rules) should apply to every occasion without exception, in which it is uttered in that shape. And so, with this unerring and unsleeping steadiness, under the uncorrupted dispensation of the tribunal of public opinion, does the punishment of shame: making (in proportion to the instruction it has imbibed from the principle of utility) a distinction, in respect of the severity of its punishment, corresponding to the shades of depravity, dependent on the occasion on which it may happen to falsehood to be uttered in this shape.

As to the remaining rules brought to view under that head, they will be seen to bear no application to the present purpose.

## CHAPTER VIII.

### OF WRITING, CONSIDERED AS A SECURITY FOR THE TRUSTWORTHINESS OF TESTIMONY.

THE art of writing, besides its other infinitely diversified applications, has been productive of such important effects, good and bad, in relation to evidence, and thence (as well as in many other ways) to judicature; that a few words, for the purpose of giving a general and comprehensive view of its application in both directions,—in the way of conduciveness, and in the way of opposition, to the ends of justice,—may not be misemployed.

Of this enquiry the practical object is almost too obvious to need mentioning: to prepare the mind of the legislator, on the one hand, for pushing to its maximum the use, on the other, for reducing to its minimum the abuse, of so powerful an instrument in the hand of justice or injustice.

In this, as in so many other instances, the union between the use and the abuse is unhappily but too close: the chemistry by which they may be separated, and the abuse precipitated, is not of easy practice.

In the character of an external security for the correctness and completeness of testimony, the uses of writing are as obvious as they are various.

1. Of *distinctness*, it is oftentimes a necessary instrument. Where the mass of testimony is small,—the string of facts requiring to be brought to view short,—the employment of this security may be unnecessary. But,—let the mass be swollen to a certain bulk,—the deponent who is able to give it the distinctness requisite for producing a clear conception of the whole in the mind of the judge, without using a pen of his own, or borrowing that of another, will not often be to be found.\*

2. In the same case, the use of it to the purpose of *recollection*, complete as well as correct recollection, may be equally indispensable. Accordingly; where writing is in common use, and testimony (as under English law) is delivered *vivâ voce*, and the transaction of which a man has been a percipient witness, has, in respect of its importance, appeared to him to be of a nature to create a probable demand for future tes-

\* On this occasion, a distinction necessary to be kept in view is the distinction between the effect of the *vivâ voce* mode on the quality, the distinctness, of the *testimony* itself,—and the effect of the same mode on the *conception* capable of being formed and retained, in relation to that same testimony, by the judge. On the part of the testimony itself, *vivâ voce* delivery (coupled, as it must be, with *vivâ voce* interrogation) may often be a necessary bar to the indefinite accumulation of irrelevant matter, and consequent increase of indistinctness: on the part of the conception formed of it by those by whom a judgment on it is to be formed, all chance of adequate distinctness would soon vanish, if the assistance of the art of writing were not called in, to give permanence to the words to which it has been consigned.

timony ; it is no uncommon incident for a man to have given ease and certainty to his memory, by committing to writing a statement of the perceptions entertained by him at the time : and by English practice, such memoranda are allowed to be consulted by him while he is in the act of delivering his evidence. At any rate ; if interrogation be employed for the extraction of the testimony, and the string of questions be long, and presented to the witness all of them, or a considerable number, at a time ; the having the questions in writing, for the purpose of giving occasional refreshment to the memory under the burthen thus laid upon it, may be altogether indispensable. For, in this case, it is not sufficient for a man to recollect the perceptions presented to him at the time, by the mass of facts in question : he must, besides this, have continually present to his mind the conception of the several questions put to him ; of the several facts to which he has thus been called upon to depose.

3. It is to the art of writing that testimony is altogether indebted for the quality of *permanence* : and thence, for the security which that quality affords for the correctness, as well as completeness, of whatever testimony has been delivered : understand, for its correctness and completeness (when it has swelled to a certain bulk) on any day, not to say hour or minute, subsequent to that on which it has been delivered.

4. One case there is, and that of no small extent, in which testimony is indebted to writing for its very *existence*. This is, where, for any cause, the appearance of the witness (the per-

cipient witness) at the judgment seat,—the place where the judicial testimony would have been to be delivered,—either is physically, or is deemed to be prudentially, impracticable.\*

In every such case, were it not for the use of writing, either the testimony would be altogether lost, or if delivered at all, it would not be delivered without being degraded from the rank of immediate to that of hearsay evidence; suffering thereby, in point of trustworthiness, that defalcation, the nature and value of which will be brought to view in its place.†

Such is the importance of good judicature to general civilization; such the importance of writing to good judicature; that,—independently of the application of this master art to the several other departments of government,—the absence of it as applied to *judicature* would of itself (it is probable) have been sufficient to stop the progress of civilization at a stage greatly below any that we see at present anywhere in Europe.

### Causes of a certain degree of simplicity—

\* As on other occasions, so on the occasion of any operations which may come to be performed in relation to evidence, impracticability may be distinguished into *physical* and *prudential*.

By a case of *physical* impracticability, I understand that case in which the effect in question cannot be produced, or the act in question performed, on any terms.

By a case of *prudential* impracticability, I understand that case in which the effect, whether physically producible or no,—the act, whether physically performable or no,—cannot (it is supposed) be produced or performed, without the production of a preponderant quantity (probability being in both cases taken into the account) of inconvenience, in the shape of delay, vexation, and expense.

† Book VI: *MAKESHIFT*, Chapters 3 and 4..

and happily the great majority of causes are within this desirable degree,—may, supposing probity on the part of the judicatory, be tolerably well decided without writing: because decision may follow upon evidence before the memory of it in the breast of the judge is become incorrect or incomplete. In a cause involved in a certain degree of complication, the use of writing is in a manner necessary to good judicature. But civilization must have stopped far short of its present advanced stage, if complicated causes had not been susceptible of just decision as well as simple ones.

If, under natural procedure (as in the small debt courts) causes are in general sufficiently well decided without the committing of the evidence to writing, it is because the description of the case is there so extremely simple: and even in these cases, security against misdecision is sacrificed in some degree to the avoidance of vexation and expence.

But though, in respect of their number, the causes simple enough to have been suffered to be decided in the way of natural procedure, constitute the most important class; yet, individually taken, causes in the highest degree complicated, possess, in general (so far as property is concerned) a proportionable degree of importance: witness bankruptcy causes and causes relative to testaments, in each of which property to the amount of millions may be at stake upon a single cause.

If such be the importance of writing, even on the supposition of undeviating probity on the part of the judicatory; its importance is in a much higher degree exemplified in the

character of a security against improbity: and in particular in the character of an instrument of extensive and lasting publication.

As it is only by writing that the grounds of decision can be made known, beyond the narrow circle composed of the few by-standers; hence without writing there can be no tolerably adequate responsibility on the part of the judge. But for writing, a single judge would decide on every occasion as he pleased; an oligarchical bench of judges, as they could agree; a democratical bench,—(as indeed is too apt to be the case, notwithstanding the benefit of writing),—a bench, howsoever composed, if the number be such that the idea of individual responsibility is destroyed,—would decide according to the caprice or passion of the moment.

Of the deplorable state in which, for want of the application of writing to this purpose, the business of judicature may be left in a democratically-constituted tribunal, (a tribunal composed of a numerous assemblage of judges, no matter of what rank), the character of Election Judicature in the House of Commons antecedently to the Grenville Act, will afford an impressive example. Under favour of the confusion,—the absolute want of all permanent memorials of the grounds which the several suffrages had to rest upon,—and the consequent mischief, the equally complete want of all individual responsibility;—no man's vote was ever grounded on any other considerations than those of personal convenience.\*

\* The great Douglas cause, and the trial of Mr. Hastings, will by many be regarded as exemplifications of a

By adding to the *natural* and unavoidable degree of complexity attached to the cause, a suitable dose of *factitious*, a party in the wrong (especially if favoured by the co-operation of a colluding judge) may give to his bad title an equal chance with the best one.

By lumping charges together, and (after a lumping mass of proof) pronouncing a lumping judgment on the whole mass,—a precedent has been set,\* under which a delinquent's chance of impunity is not in the inverse, but in the direct, ratio of the number of his crimes. Such judicature having been found practicable, notwithstanding the check applied by the art of writing; what would it have been without that check?

In the cases of Peru, Mexico, and Tlascala, may be seen a specimen of what degree of civilization it is possible for society to reach without the application of writing to the fixation of the grounds of decision in judicature: higher than in those instances it could hardly have risen without that help.

similar result produced by an opposite cause. Why? Because, where writing is concerned, too much may have the effect of too little. By supersaturation, as well as by inanition, the powers of the mind, as well as those of the body, may be destroyed.

If, of the want, or (what may in an extraordinary case be equivalent) of the superabundance, of permanent grounds of judicial decision, the effect has been so disastrous in modern England, notwithstanding its acknowledged pre-eminence in judicial purity; how much more frequently, not to say constantly, must it have been so, in ages of far inferior morality, under the tumultuary constitution of Athenian or Roman judicature?

\* See the Trial of Warren Hastings.

In its original constitution, jury-trial, being unaided by writing, would in England have been sufficient to confine civilization within bounds as narrow as those which circumscribed it in Peru, Mexico, and Tlascala. If, under jury-trial, writing has latterly been applied to the fixation of the grounds of decision, it is unhappily in but an accidental and imperfect way. Hence it has happened, that, in cases to a certain degree complicated, this mode of judicature is seen to be inapplicable; being in some cases recognized as such by established usage, equivalent in force to law; in others, though not by law, in necessary practice.

Writing being of use, and frequently in a great degree even matter of necessity, in all stages of the suit; so is it in the hands of all classes of persons concerned in it.

In the hands of the parties, it serves to give permanence to evidence; to constitute the matter of the instruments exhibited in the character of sources of evidence.

In the hands of the judge, and his official subordinates, it serves to preserve the memory of operations: to *register*, to record, to consign to permanent characters, in proportion as they are performed, the fact of their having been so.

But the delivery of an instrument to this or that effect, is itself a capital article in the catalogue of those operations. Hence registration of instruments, as well as of operations, falls naturally within the province of the judge.

The indication which has been given of the uses of writing as applied to the subject of evidence, has a sort of claim to be accompa-

nied with a correspondent sketch of its uses as applied to the business of registration.

Subjects for judicial registration, with their uses :—

1. Representation of operations successively performed, and instruments successively presented, for the purpose of grounding such subsequent operations and instruments, as may come to be called for, or warranted, by such preceding ones.

2. Representation of operations performed, and orders given, or other instruments made, by or under the authority of the judge, on the occasion of the operations and instruments emanating from the parties as above.

3. Grounds and reasons of such operations and instruments, as aforesaid, on the part of the judge.

N.B. To be of use, these grounds and reasons will not consist of argumentation uttered on each occasion by the judge himself, but of the indications given of so many matters of fact, brought to light in the course of the cause: indications given in the concisest possible form, under heads prescribed by the legislator for that purpose.

4. At the special instance of either party, this or that proposition, or even word, that may have dropt from the lips of the judge. In the particular suit upon the carpet, be the importance of the subject-matter in dispute ever so trifling, the language used by the judge may be to any degree important. By language, (not to speak of deportment, which is not so easily rendered the subject of registration), disposition is manifested: and, in a judge, the effects of

disposition extend to whatever suits are liable to come under his cognizance. Not a blemish of which the judicial character is susceptible, but language may have served for the manifestation of it.

In each house of parliament, whatever word is spoken by any member, is liable to be taken down at the instance of any other. This check, instead of being an infringement, is the most efficient security for that just liberty of speech, without which such assemblies would be worse than useless. The beneficial efficacy is in reality the greater, in proportion as it is less manifested : it is composed of the improprieties that but for this check might have been uttered, but are not uttered.

In the practice of the courts of justice (the regular courts) this institution is not without example. Witness the bill of exceptions. But in that instance the application of it is confined within narrow limits : whereas there, as in parliament, the demand for it has no limits.

Uses of the above registrations.

1. To the several parties, on the occasion of the suit in hand, the use of them, in a direct way, is already evident.

2. So, in a less direct way, in respect of the check they apply to abuse in every shape on the part of the judge : corruption, undue sympathy, antipathy, precipitation through impatience, delay through indifference and negligence.

3. With a view to appeal on the occasion of the suit in hand,—the service capable of being rendered by such registration to both parties, (and especially to him who is in the right), by the complete and correct indication of all

grounds of appeal, justly or unjustly alleged, seems alike evident.

4. In respect of future contingent suits, considered as capable of being produced, prevented, or governed, by the result of, or previous proceedings in, the cause in hand,—suits considered as liable to arise between the same parties, or their legal representatives,—the utility is alike manifest.

5. In respect of future contingent suits, considered as liable to be produced by like causes, or to give birth to like incidents and occurrences,—causes as between other parties having no connection with those in question; the use of such registration in the character of a stock of precedents seems alike indisputable.

The service thus capable of being rendered, will be rendered partly to individuals at large, in the character of eventual suitors in such eventual causes, in respect of their respective interests; partly to the judge, in respect of security, facility, and tranquillity, in the execution of his official duty.

6. To the legislator, the guardian of the people, and through him to the people at large, the service rendered by the aggregate mass of the facts thus registered will be seen to be more and more important, the more closely it is considered.

By the abstracts made of the body of information thus collected (abstracts prepared under a system of appropriate heads, and periodically presented and made public) he will see throughout in what respects the existing arrangements fulfil,—in what respects (if in any) they fail of fulfilling,—his intentions: how far they are con-

ducive,—in what respects (if in any) they fail of being perfectly conducive,—to the several ends of justice.

With the sketch of what is here stated as capable of being done, confront the loose sketches that will hereafter come to be given of what is actually established: the difference between use and abuse will present itself in colours not very obscure.

If the services thus rendered to the interests of truth and justice, by the art of writing, are thus great; neither are the ways in which it is liable to be made to operate, and to a great extent is continually made to operate, to the injury of those interests, by any means inconsiderable.

1. If, on certain occasions, and in certain ways, it is capable of being employed as an instrument of distinctness, for giving that indispensable quality to a mass of evidence; on other occasions, and in other ways, it is but too apt to be employed in such a manner as to give to the evidence a degree of indistinctness, from which, but for the abuse made of this important art, it would have been free.

The reason (meaning the cause) of this abuse is extremely simple. To the quantity of irrelevant matter, to which (under the spur of sinister interest) the pen of a writer is, on this as on so many other occasions, capable of giving birth, there are no determinate limits: nor yet to the degree of disorder, and consequent indistinctness, with which the whole mass, made up of irrelevant and relevant matter jumbled together, may be infected: and the same mischief which thus, to an infinite de-

gree, is liable to be produced by *mala fides* on the part of the suitor or his professional assistant, may (though in a less degree) be produced by mere weakness of mind on either part. Whereas, in the case of *viva voce* testimony extracted by, or substituted to, interrogation,—no sooner does an irrelevant proposition make its appearance, than the current of the testimony in that devious direction is stopped, and the stream forced back into its proper channel.

2. When writing is employed in the extraction, and thence in the delivery, of the testimony; time applicable, and but too often applied, to the purpose of mendacious invention, is a natural, and practically (though not strictly and physically) inseparable, result: as will be seen more particularly in its place.\*

3. In the same case, a result, no less closely connected with the use of writing than the former, is the opportunity afforded by it for receiving mendacity-serving information from all sorts of sources: a danger, from which *viva voce* deposition, though by no means exempt, is more easily guarded.

On the other hand; where writing is employed for the delivery and extraction of evidence; the superior facility which it affords for planning the means of deception, is accompanied and in a considerable degree counteracted and compensated on the part of the adverse party and the judge, by a correspondent quantity of time (and thence a correspondent means) applicable to the purpose of

\* See Book III. EXTRACTION.

scrutinizing the supposed mendacious testimony, and so divesting it of its deceptitious influence.

Hitherto we have considered the art in no other light than that of its capacity of being made subservient to the purposes of that species of injustice which is opposite to the *direct* end of justice: subservient to deception, and thence to misdecision.

But the grand abuse, and that in comparison of which what has hitherto been brought to view shrinks almost into insignificance, is the perverted application that has been made of it to the purposes of that branch of injustice which stands opposed to the *collateral* ends of justice: of that branch of injustice which consists of factitious delay, vexation, and expense, heaped together for the sake of the profit extractible and extracted from the expense.

In a word, it is in the art of writing thus perverted, that we may view the main instrument of the technical system, and of all the abominations of which it is composed: an instrument by which this baneful system, wheresoever established, has all along operated; and without which it could scarcely have come anywhere into existence.

It is on pretence of something that has been written, or that might, could, or should have been written, that whatever portion of the means of sustenance has, on the occasion or on the pretence of administering justice, been wrung from the unfortunate suitor, has been demanded and received. Statements that ought not to have been made, have, to an enormous extent, been made: statements that

required to be made, have been swelled out beyond all bounds; stuffed out with words and lines and pages of surplusage, oftentimes without truth, sometimes even without meaning, and always without use. This excrementitious matter has been made up into all the forms that the conjunct industry of the demon of mendacity, seconded by the genius of nonsense, could contrive to give to it. Having by the accumulated labours of successive generations been wrought up to the highest possible pitch of voluminousness, indistinctness, and unintelligibility; in this state it has been locked up and concealed from general view as effectually as possible: in England it has been locked up in two several languages, both of them completely unintelligible to the vast majority of the people. Office upon office, profession upon profession, have been established for the manufacturing, warehousing, and vending of this intellectual poison. In the capacity of suitors, the whole body of the people (able or unable to bear the charge) are compelled to pay, on one occasion or another, for everything that was done, or suffered or pretended to be done, in relation to it: for writing it, for copying it, for abridging it, for looking at it, for employing others to look at it, for employing others to understand it, or to pretend to understand it: interpreting and expounding imaginary laws, laws that no man ever made.

Thus much for this branch of the abuse: thus much for a bird's eye, or rather an aero-static, view of it. To consider it heap by heap, is a task that belongs not to this place; a labour that will continue to press upon us,

through every part of this toilsome and thankless course.

The uses and the abuses of writing in judicial procedure have now been briefly enumerated: the various arrangements which have for their object to bring the use to its maximum, and the abuse to its minimum, will be severally brought to view in the proper place.

## CHAPTER IX.

### OF INTERROGATION, CONSIDERED AS A SECURITY FOR THE TRUSTWORTHINESS OF TESTIMONY.

#### SECTION I.—*Uses of interrogation, as applied to the extraction of testimony.*

IN the character of a security for the correctness and completeness of testimony, so obvious is the utility and importance of the faculty and practice of interrogation, that the mention of it in this view might well be deemed superfluous, were it not for the cases, to so prodigious an extent, in which, under English law, it is barred out by judicial practice.

1. The case in which its utility is most conspicuous, is that of *mala fides* on the part of the deponent: and this, being a state of things which in each individual instance may (for aught the legislator can know) have place, is a state of things for which, on every occasion, in the arrangements taken by him, provision ought to be made.

*Completeness* is the primary quality, with reference to which the demand for it is most obvious: fear of punishment and fear of shame

having here less influence than as applied to secure correctness. In case of incompleteness, neither punishment nor shame apply, any further than as it is established that the omitted part came under the perception of the deponent, preserved a place in his remembrance, and presented to him, along with itself, the idea of its importance.

Importance being assumed, incompleteness may indeed become equivalent to, and a modification of, incorrectness: but in general it is by interrogation, and by interrogation only, that it is rendered so.

Do you remember nothing more? did nothing further pass, relative to this or that person or thing (naming them)? By interrogations thus pointed, such a security for completeness is afforded as can never be afforded by any general engagement which can be included in the terms of an oath or other formula: be the engagement what it may, in the course of the deposition the memory of it may have evaporated: and suppose it borne in mind—yet, without the aid of interrogation, the violation of it by suppression of the truth loses its best chance of detection.

2. *Particularity*, if it be not included under the notion of completeness, is no less indispensable to the purposes of testimony. But suppose a deposition delivered, and, in so essential a point, a deficiency remaining in it: by what means, if at all, shall the defect be supplied? Interrogation, it is evident, is the sole resource.

By particularity only can that repugnancy to known truths be established, by which mendacity is demonstrated.

Under what tree was the act committed? was the question put by the prophet Daniel, to each of the two calumnious elders. Under a holme tree, answered the one: under a mastic tree, answered the other. But for the proof of mendacity, the question would have been irrelevant and superfluous: for, supposing the forbidden act committed, what mattered under what tree, or whether under any tree? But, for the detection of mendacity, no question that can contribute any thing, can be irrelevant: and the more particular, the better its chance of being productive of so desirable an effect.

By interrogation, and not without, is the improbity of a deponent driven out of all its holds. An answer being given, is it true? It is useful in the character of direct evidence. Is it false? It stands exposed to contradiction, both from within and from without: and, being detected, it operates as an evidence of character and disposition, and thence in the way of circumstantial evidence. Is silence, pure silence, the result? Even this is evidence, circumstantial evidence. The deponent, is he an extraneous witness? According to the nature of the question, it may afford as impressive a presumption of falsehood, antecedent or subsequent, as could have been afforded by detected falsehood. Is he a party to the cause? Besides the particular mendacity, it may afford a presumption of his own consciousness of the badness of his cause.

The testimony, is it indistinct, nugatory, unintelligible? such indistinctness, if persevered in, and not the result of mental infirmity, is equivalent to silence.

In no case, be the sincerity of the deponent ever so unquestionable—in no case, either to completeness or correctness, can the faculty of interrogation be a matter of indifference. not even in ordinary conversation between bosom friends.

What father could be satisfied with the narrative of a long lost child ; what lover with that of his mistress, without a possibility of perfecting his satisfaction by questions ?

In no state can a deponent's mind be, in respect to interest, but that interrogation may be necessary to the purpose as well of correctness as of completeness.

In every possible result, does he behold an event of the most consummate indifference ? A fact really important may be left out of his narrative, either because not recollected at the time, or because, though recollected, its materiality with regard to the cause had not presented itself to his view.

Is he even desirous and eager to bring forward every circumstance that can serve the party by whom his testimony has been invoked? still, a circumstance may have been forgotten, or its materiality have escaped notice.

Supposing even a party in the cause—say a plaintiff—adducing his own testimony, deposing in support of his own demand (under English law, a state of things rarely exemplified in form, but in substance frequently) : a poor person, say, prosecuting in the hope of recovering goods lost by stealth. With all the interest and all the will that can be imagined, intellectual power may be insufficient to bring to light, in a complete body, the material circumstances, without the aid of

some superior intelligence in the character of an interrogator, in the person of an advocate or a judge.

In a word,—but for interrogation, every person interested, in whatever way interested, in the manifestation of truth, is completely dependent on the deponent; and on the state not only of the moral but of the intellectual part of the deponent's mind.

**SECTION II.—Exceptions to the application of interrogation to the extraction of testimony.**

Were security against deception and consequent misdecision the only object that had a claim to notice, the use of the security afforded by interrogation ought never to be foregone.

But, in this case as in all others, the mischief of that injustice which is opposite to the *direct* ends of justice, may find more than a counterpoise, in mischief which is opposite to the *collateral* ends of justice; inconvenience in the shapes of delay, vexation, and expence, jointly or even separately considered.

Take for examples the following cases, in which, for avoidance of preponderant collateral injustice, it may happen that the security afforded by interrogation ought to be foregone: that is, in which it will generally or frequently happen, that the mischief resulting from the application of the security, will be greater in value (probability taken into the account) than any mischief that can take place for want of it.

1. Cases where the *delay* necessary to interrogation may be productive of irreparable

damage: where, for example, the use of the evidence is to ground an application for stopping 1. expatriation of the defendant, for avoidance of justiciability,\* 2. exportation of property in his hands, for the like purpose, 3. deportation for the purpose of slavery, 4. deportation (the person a female) for the purpose of wrongful marriage or defilement, or, 5. wrongful destruction or deterioration of another's property, by operations clandestine or forcible. To form a ground for arrestation, seizure, sequestration, and so forth, on any of these accounts, testimony is requisite. If time admit of the subjecting this testimony to the scrutiny of judicial interrogation, so much the better; but if not, better that it be received and acted upon without the interrogation, than that any such irreparable mischief should be done.†

\* A case for the writ called *ne exeat regno*, in English equity practice.

† In English law, in all the cases in which a man is laid provisionally under restraint *pendente lite*, the testimony on which the restriction is grounded is in the uninterrogated form, that of an affidavit.

For a debt above a certain value, a man is liable to be held to bail (that is, arrested, consigned to prison, and confined there for an indefinite time) unless he finds persons who engage for the eventual consignment of his person to the same fate. The testimony requisite to ground the warrant for this purpose, is the mass of sworn but uninterrogated deposition called an affidavit. What the affidavit must, though only in general terms, assert, is the justice of the claim: but what it need not assert, nor ever does assert, is the necessity of this legal infliction to secure the payment of the debt.

In some cases, a man, against whom another has a claim, may be stopped from going out of the kingdom; and, on this occasion likewise, to ground an application for this purpose,

2. Cases where the benefit of the security afforded by interrogation may be outweighed by the expense unavoidably attached to the application of it: as, if the seat of the judicatory in which the decision is to be pronounced, be in London or Paris, and the evidence of the deponent in the East Indies.

To determine the preponderance, as between the mischief on the score of direct injustice, and the mischief on the score of collateral in-

an affidavit is necessary. But in this case notice must be given, such as will in general enable the man to get off. So in case of irreparable destruction meditated, time, such as in general will be sufficient, is in like manner allowed him to effect it.

In neither of these cases is the person, on whose uninterrogated deposition the act of power is grounded, liable to be ever subjected to interrogation in any case.

As to the stoppage of effects; for any such purpose the law affords no power on any terms.

In Scottish procedure, on the petition of an alleged creditor, any person may, by warrant from a justice of the peace, be arrested on the ground of his being *in meditatione fuga*, and committed, until he finds security for "giving suit and presence in any action." But, before the warrant is granted, the petitioner appears before the justice, and is examined upon oath, producing a written account of the particulars of the alleged debt. In how high a degree this mode of procedure is preferable to the above English modes, will appear clear enough to any eye that is not averse to seeing it.\* The fault, as is well observed by Mr. Mac Millan, consists in the committing the alleged debtor to prison at once, without giving him an opportunity of being heard by the judge, and in his presence being confronted with the adversary: but this injustice is common to English, as well as Scottish law.

\* Mac Millan's Form of Writings, Edinburgh, 1790, third edit. p. 289.

convenience in this shape, will be matter of detail for the legislator, and under him for the judge.

Interrogation in the epistolary mode, or by judges for the occasion on the spot, affords, for the giving the evidence the benefit of this security, two other resources: either of which, where practicable, will be preferable to the receipt of the testimony in an uninterrogated state.

As to the case of *veration*, independent of expense; examples of it will be seen to more advantage in another place; when the cases, where it is proper to put on that ground an absolute exclusion upon evidence, come to be considered.

Where, for the avoidance of collateral inconvenience in the shape of delay, vexation, and expense, the application of this security is dispensed with; the following rules are expressive of the *conditions* which seem proper to be annexed to the dispensation. 1. The exemption ought not to be absolute and definitive. The inconvenience being removed, either *in toto*, or to such a degree as to be no longer preponderant, interrogation ought to take place; either of course, or at the instance of a party interested, or of the judge. 2. In a case where the deponent (he who has been deposing in the uninterrogated form) is liable as above to interrogation; if his deposition was either delivered in the ready-written form, or, being delivered in the oral form, was committed thereupon to writing, for which purpose appropriate paper is employed; notice of the eventual interrogation

ought to be inserted (as for example it is when ready printed) on the margin.

For, to the purpose of preventing *incorrectness* and *incompleteness* (preventing, in a word, the testimony from being rendered *deceptive*) it is material that the deponent should be pre-apprised of the scrutiny which it may continually have to undergo: and, for making sure of his being thus pre-apprised, no other expedient can be more effectual than this simple and unexpensive one.

### SECTION III.—*On whom ought interrogation to be performable?*

On whom? Answer: On every individual from whom, in the character of a deponent, testimony is received: saving the case of preponderant collateral inconvenience, as above.

If, at his own instance, at the instance of a co-party on the same side, or at the instance of his adversary, the testimony of a party (plaintiff or defendant) be received; it should of course, and for reasons not less cogent than in the case of an extraneous witness, be subjected to this scrutiny: and it will be shown elsewhere,\* that, in no instance, in any of the above cases, should the testimony of a party stand excluded, or the measures proper and necessary for the extraction of it, if called for by an adverse party, be omitted: any more than in the case of an extraneous witness.

*Official* evidence presents a case in which the demand for interrogation on the score of

\* Book IX. EXCLUSION. Part V. DOUBLE ACCOUNT.

security against mendacity, and thence against deception and misdecision, will, generally speaking, be at its *minimum*: while on the other hand the inconvenience, in respect of vexation, may be at its *maximum*, comparison being made with individuals whose residence is at no greater distance: inconvenience, of which part will be to be placed to the account of the individual (the officer), part to that of the public service.

But unless, by being placed in the office in question, a man is purified from all the infirmities (intellectual as well as moral) incident to human nature; in the instance of no such office can the exemption from this security be with propriety regarded as unconditional and definitive.

Applied to official testimony, the objection bears with considerably greater force, on oral interrogation than on scriptitious: the oral being the only mode of the two, to which the vexation and expense incident to attendance (at the judicatory), with journeys to and fro, and demurrage, is liable to be attached.

If the above observations be just, the practice of English law under the technical system must, in cases in great abundance and to a great extent, be radically vicious: favourable to incorrectness, to incompleteness, to mendacity, to consequent deception and misdecision:—*affidavit* evidence (i.e. *uninterrogated* testimony) being received, and to the exclusion of interrogated testimony from the same individual,—on the *main* question, in a class of causes in great abundance and to a great extent,—and in causes of all classes, on those *incidental* questions by the determination of which the fate of the cause is liable to be,

and frequently is, determined :—*official* evidence received without the security afforded by interrogation, as well as without the security afforded by the eventual subjection to that punishment, which, by the penal consequences attached to a violation of the ceremony of an oath, is hung over the head of mendacity at large :—and these securities against mendacity removed with particular care, in the instance of that class of official evidence (I speak of the sort of judicial evidence called a *record*), each article of which is by no other circumstance so remarkably and incontestably distinguished from every other species of official evidence, as by its being replete with pernicious falsehoods: some with facility enough, others with more or less difficulty, capable of being distinguished from the small proportion of useful truths that are to be found in it.

#### SECTION IV.—*By whom ought interrogation to be performable?*

To whom ought the power of interrogation to be imparted? Answer: To every person by whom it promises to be exercised with good effect: subject always to the controul of the judge,—but for which, any power of command might, on this as well as on any other occasion, run into the wildest despotism.

And by whom is it likely to be exercised with good effect? Answer: By every person in whom suitable *will* and *power* are likely to be found conjoined. *Will*, the product of adequate *interest*, in the most extensive sense of the word *power*, consisting, in the present case, of

appropriate information, accompanied with adequate ability of the intellectual kind.

Of the extent thus proposed to be given to the power of interrogation the propriety stands expressed in the following aphorisms, which seem to claim a title to the appellation of axioms.

1. For every interrogator, in whose person adequate interest and natural power unite, an additional security is afforded for correctness and completeness, and thence against mendacity and temerity on the one part and deception and misdecision on the other.

2. Against the admission of any proposed interrogator, no objection consistent with the ends of justice can be raised, on any other ground than that of mendacity-serving suggestion, or that of preponderant collateral inconvenience in the shape of delay, vexation, and expense: placing to the account of useless delay and vexation every proposed interrogation, that, in the judgment of the competent judge, is either *irrelevant* or *superfluous*.

The individuals in whose persons these requisites may be expected are, 1. The judge (including, in English jury trial procedure, the jurymen, as well as the directing judge or judges). 2. The plaintiff or plaintiffs. 3. The defendant or defendants. 4. The advocate or advocates of the plaintiff or plaintiffs. 5. The advocate or advocates of the defendant or defendants. 6. In some cases even extraneous witnesses.

There is a species of procedure in which there is no party on the plaintiff's side: in causes tried under this species of procedure, the func-

tion of the plaintiff is really exercised by the judge.

There is another species of procedure, in which there is no party on the defendant's side: in causes thus tried, the function of the defendant is exercised by the judge.

In causes of the above several descriptions, the number of possible interrogators suffers a correspondent reduction.\*

\* The following are cases, in which, if there be interrogation at all, there is but one person by whom it can be applied.

The occasion may be non-litigious or litigious: and, being litigious, the enquiry may be to be performed *ex parte*, (on one side only), or *reciprocally*, (on more sides than one).

I. Occasion non-litigious: an individual to deliver testimony; a judge, or a person acting on this occasion and *quoad hoc* in the character of a judge, to receive it: and either to act or not to act in consequence.

Examples. 1. Where a man makes application for money at a public office, as in England at the Exchequer, the Bank, and so forth. 2. Where a man, in the view of gaining general credence for certain facts, and of perpetuating the remembrance of them, comes forward of his own accord, and makes a solemn statement of them in the presence of a judge: as in England in the case of a voluntary affidavit sworn before a justice of the peace. 3. Enquiries carried on by a person or persons in the character of judges, for the purpose of bringing to light a particular class of facts, without any particular view to individual persons in the character of actors: as by a committee of either house of parliament, or by a commission of enquiry organised by the whole legislature.

In all these several cases, if the propriety of interrogation be supposed, the necessity of its being performed by the person standing *quoad hoc* in the station of judge, follows of course; there being no person else to perform it: In the third case, the interrogation is matter not of propriety only, but necessity: in the two others, whether it be or be not matter of propriety belongs not to the present purpose.

When the list of characters capable of bearing a part on the theatre of justice is complete, there are, of proposed deponents, four descrip-

II. The occasion litigious : but the examination, as yet at least, *unilateral* : on one side only. In this class of cases, the nature of the case affords but one person in a condition to be subjected to the operation ; and but one person in a condition to perform it, viz. the judge. This case admits of the following modifications.

1. One person only as yet appearing to be interrogated, and he, as yet at least, not fixed in the character of a party, but examined (at least for the present) in the character of an extraneous witness : the deponent appearing at the judgment seat, either spontaneously, or by order of the judge.

Example.—A dead body with marks of violence found by two persons in company. One of them gives information to an officer established for that purpose under the name of a coroner : the coroner by his warrant procures the attendance of the other. Both of them, together with such other persons as the nature of the case indicates as likely to be able to furnish information, are examined with a view of finding out the cause of the death. What may happen in this case is, that one of them shall, in the course of the enquiry, be fixed in the character of defendant; the other, in the character of plaintiff. Such, accordingly, was the result in the case of Captain Donnellan, executed for the murder of Sir Theodosius Boughton by poison.

2. One person only as yet appearing, and he in the character of a plaintiff, exhibiting in that character a criminal charge or non-criminal demand against a person not as yet appearing or having appeared. Examples in English law : 1. In regular procedure, application to a justice of the peace, by a person complaining of an assault, for a warrant to compel the appearance of the assailant. 2. In summary procedure, information given of an alledged offence to a justice of the peace, to ground a summons or warrant for compelling the appearance of the alledged delinquent.

3. One person only as yet appearing, and he in the character of a defendant : the function of plaintiff being (either throughout or in the first instance) united to that of judge. Example : in Roman law, the species of procedure called

tions: a plaintiff; a defendant; a witness (viz. an extraneous witness) called on the plaintiff's side; a witness called on the defendant's side.

Proposed interrogators, to each proposed deponent, seven. When the proposed deponent is the *plaintiff*; 1. the judge (including, in the case of jury trial, the several jurymen); 2. this same plaintiff's own advocate; 3. any defendant or his advocate; 4. any co-plaintiff or his advocate; 5. any witness called by this same plaintiff; 6. any witness called by any defendant; 7. any witness called by a co-plaintiff.

From hence, *mutatis mutandis*, may be determined the correspondent proposable interrogators in the respective cases of the three other descriptions of proposed deponents. Proposed deponents, 4: to each one of them, proposed interrogators, 7: by multiplication, total number of cases for consideration, 28.\*

*inquisitorial*, in contradistinction to *accusatorial*, which presents a distinct person in the character of plaintiff.

In these several cases likewise, if the propriety of interrogation be supposed, the necessity of its being performed by the judge follows of course, there being no other person to perform it.

\* I. A plaintiff deposing, may be interrogated by or in behalf of the characters following: viz.,

1. The judge.
2. His own advocate.
3. A co-plaintiff or his advocate.
4. A defendant or his advocate.
5. A witness called by himself.
6. A witness called by a co-plaintiff.
7. A witness called by a defendant.

II. A defendant deposing, may be interrogated by or in behalf of the characters following: viz.

1. The judge.

If the principle above laid down be correct, (viz., that, except as excepted, every interest ought to have its representative in the person of an interrogator) a consequence which follows is —that, of the above eight and twenty cases of interrogation, in so many as under any system of procedure are peremptorily excluded from having place, so many cases of incongruity stand exemplified.

English common law procedure exhibits a multitude of different modes of receiving and collecting testimony: Roman and Rome-bred procedure (including English equity, English

2. His own advocate.
3. A co-defendant or his advocate.
4. A plaintiff or his advocate.
5. A witness called by himself.
6. A witness called by a co-defendant.
7. A witness called by a plaintiff.

III. A witness (viz. an extraneous witness) called by the plaintiff, may be interrogated by or in behalf of the characters following: viz.

1. The judge.
2. The said plaintiff or his advocate.
3. Another plaintiff or his advocate.
4. A defendant or his advocate.
5. Another witness called by the plaintiff by whom he was called.

6. A witness called by another plaintiff.
7. A witness called by a defendant.

IV. A witness called by the defendant, may be interrogated by or in behalf of the characters following: viz.

1. The judge.
2. The said defendant or his advocate.
3. Another defendant or his advocate.
4. A plaintiff or his advocate.
5. Another witness called by the plaintiff by whom he was called.
6. A witness called by another plaintiff.
7. A witness called by a defendant.

ecclesiastical court, and English admiralty court procedure) another multitude : in many, or most of them, the list of proposed deponents and interrogators is more or less different, and the difference not governed by any consistent regard (if by any regard at all,) to the grounds of exception above brought to view. Of these established modes of practice, that all are wrong, will, if the above principle be correct, be found more than probable ; that all are right, will be found absolutely impossible.

All the parties, and on both sides of the cause, have been placed upon the above list of persons, on whom, in the character of witnesses (each of them as well at his own instance and at the instance of a party on the same side of the cause, as at the instance of any party on the opposite side of the cause), the process of interrogation may with propriety be performed. Under the established forms of procedure, under the general rule, (so far as, in the midst of such diversity and inconsistency, any thing under the name of a general rule can with propriety be spoken of), both these classes of proposed deponents stand excluded : excluded, if proposed at their own instance or that of a party on the same side, on the score of *interest* ; if proposed at the instance of the opposite side, excluded (principally in the case of a defendant) on the ground of *vexation*.

But on the ground of interest, so futile is the pretence, that, in cases where to any amount the impulse of sinister interest is more forcible, the exclusionary rule is itself excluded : and on the ground of vexation, when the vexation is not less galling, and (by reason of the inferiority of the species of evidence) attended with a much

greater probability of deception and misdecision, the exclusion on this ground has no place : and moreover, at his own instance, the same party, who is not admitted in the guise of a party, is admitted with the sinister interest acting in full strength in his bosom, under a variety of disguises.\*

In so great a multitude of proposed cases for interrogation, two clusters shall be here selected for special explanation : the case of the advocate under all its diversifications, and the case of the extraneous witness under all its diversifications. The other cases are sufficiently simple to require no special notice.

In case the second of the twenty-eight, it is assumed, that a plaintiff ought to be capable of being interrogated by his own advocate. To an English lawyer on one side of the great hall, the necessity of the admission will be apt to appear so palpable, that every word employed in proof of it would be so much thrown away. But on the other side of the same hall, the door of the evidence-collecting judicatory is inexorably shut against the interrogating advocate, as well as against every other interrogator but the underling, who to this purpose stands in the place of judge.

In the case of interrogation here proposed, are included two assumptions : the propriety of admitting as the representative and assistant of a party, a person who is not a party ; and the propriety of his being a professional advocate : the professional advocate being of course understood to be included under the appellation of advocate.

\* See Book IX. EXCLUSION.

Of the occasional admission of a person in the character of an assistant to the party (supposing it a case in which admission may with propriety be given to the party himself) the necessity stands demonstrated by the following causes of infirmity and relative incapacity, under which a party is liable to labour : 1. Infirmitv from immaturity of age, or superannuation. 2. Bodily indisposition. 3. Mental imbecility. 4. Inexperience. 5. Natural timidity. 6. Female bashfulness. 7. Lowness of station, in either sex.

True it is that there sits a judge, whose duty (it may be said) is, on this occasion as on others, to act as an advocate—not indeed on either side, but on both.

But on the part of an advocate, to enable him to fulfil his duty in an adequate manner, two endowments are necessary : appropriate information in all its plenitude, and the zeal that is necessary to turn it to full account. On the part of a judge, neither requisite (in a measure sufficient for all causes, or even for the general run of causes,) can on any sufficient ground be expected : much less both.

In the particular case here supposed, the party is by the supposition, present : but he may be absent, and that unavoidably.

Of a substitute to the party, the necessity is co-extensive with the cases where the attendance of the party is either in the *physical* or the *prudential* sense impracticable.

On the occasion here in question, as on other judicial occasions, the necessity of giving admission to a professional advocate is indicated by the following considerations.

1. An adequately qualified non-professional

and gratuitous assistant or substitute would not always be to be had.

2. In so far as appropriate learning is necessary, (and all the art as well as all the power of the profession has been employed for ages in rendering that necessity as universal and cogent as possible), a non-professional assistant or substitute would very seldom be adequately qualified.

True it is that (so far as matter of fact only is in question) neither in point of appropriate information nor in point of zeal can the professional advocate be naturally expected to be so much as upon a par with the friendly and unpaid substitute or assistant. Though in practice Judge and Co. have taken too good care of themselves and one another not to exclude all such odious interlopers; yet the exclusion is the result of positive and abusive institution, not of the nature of the case.

Besides those which, as above, are the result of artifice,—two other advantages are, on the occasion in question, naturally enough attendant on the intervention of the professional, in contradistinction to the non-professional, advocate: advantages which may be reckoned as such, even with reference to the cause of justice.

But for this resource, a wrong-doer may, to the prejudice of the party wronged, possess on this occasion two advantages of a very oppressive nature: the advantage of the strong over the weak in mind; and the advantage of the high over the low in station. In a cause of a doubtful or intricate nature, nothing but such a union of talent and zealous probity, as would be too great to expect with reason, on the part of

an ordinary judge, more especially of a juryman, can prevent these advantages (even in a separate state, much more when united,) from operating in a degree highly dangerous to justice. But, unless in case of a species of corruption which is not of the number of those over which fashion throws its veil, the advocate is the same to all; to low as well as high.

Unfortunately, however, in this supposition is included the being in a condition to purchase such high-priced assistance: and the great majority of those who have need for justice, are far from being in that condition.

But though the advocate, (whatsoever may be the ascendant attached to his rank in the profession), being the same to all, will not be more apt to make an abusive application of it, to the advantage of the high and opulent (as such), in their warfare with the low and indigent; this sort of impartiality will not hinder him, it may be said, from employing it in another manner, more directly and certainly prejudicial to the cause of justice.

Under the name of *brow-beating*, (a mode of oppression of which witnesses in the station of respondents are the more immediate objects), a practice is designated, which has been the subject of a complaint too general to be likely to be altogether groundless. Oppression in this form has a particular propensity to alight upon those witnesses who have been called on that side of the cause (whichever it be) that has the right on its side; because, the more clearly a side is in the right, the less need has it for any such assistance as it is in the nature of any such dishonest arts to administer to it.

But, of the assistance of a professional advocate to the cause of justice, where such assistance is to be had, the utility is grounded in the nature of things: whereas the abuse thus characterized by the name of *brow-beating*, is not, as will be seen, altogether without remedy.\* Brow-beating is that sort of offence which never can be committed by any advocate who has not the judge for his accomplice.

In respect of appropriate information (with relation to the purpose in question), under the technical system the advocate is but too apt to be deplorably deficient: the advocate seeing nothing of the facts but through the medium of another professional man, rich in opportunity, and prompted by interest in a variety of shapes, to misrepresent or intercept them. But the sinister advantage which the technical system has contrived to give itself in this respect, depends upon the fundamental arrangement by which it excludes the parties, on all possible occasions, from the converse and presence of the judge. On the occasion here in question, the presence of the party in question is supposed.

In the particular case here in question, that of a party (the plaintiff) in the cause, proposed to be interrogated by his own advocate; an objection, obvious enough in theory, grounds itself on the danger of prompting or suggestive questions, in a word of mendacity-serving information. But on a closer examination this danger will be seen to lose much of its magnitude: meantime it may not be amiss briefly to

\* Book III. EXTRACTION. Chapter 5.

† Book III. EXTRACTION. Chapter 3. *Suggestive Interrogation.*

observe, that, in the shape of actual mischief, it does not appear to have been felt in English practice.

Compared with this second case; case ninth, (in which, the deponent's own advocate being still the proposed interrogator, the party proposed to be interrogated by him, instead of being as in the former case the plaintiff, is the defendant), presents some slight difference:—in a criminal case, especially in a case where the punishment is raised to the highest pitch of severity, the incitement to afford mendacity—serving information in the shape of a question is in itself much greater; at the same time that the topic of humanity presents an excuse, beyond any that applies in the other case. But, that even in this case the objection is not weighty enough to be preponderant, will be seen in the place referred to as above.

Be this as it may: whether for this or for any other reason, or (what is on all occasions at least equally probable) without any consideration on the ground of reason; in English criminal law,—though the plaintiff, under the name of prosecutor, is allowed to be interrogated by his own advocate,—that allowance is not extended to the defendant. But an observation to be made at the same time is,—neither is he allowed to be interrogated by any body else: he tells his own story if he pleases; but, however deficient it may be, either in point of correctness or completeness, effectual and anxious care is taken that (in this way at least) the deficiency shall not from any quarter be supplied.

In twelve out of the eight and twenty cases,

it is assumed that a witness ought to be considered as capable of being admitted to act in the character of an interrogator, i. e. to put questions, as well to a party as to a witness, on either side of the cause.

To an English lawyer, on either side of the great Hall, the idea will be apt to appear too strange and visionary to have ever been exemplified in practice. It was, however, in common practice, at any rate in the French modification of the Roman system of procedure, in criminal causes of the most highly penal class. *Confrontation* was the name of a meeting which the judge was in most instances bound to bring about between the prisoner and the several witnesses on the other side—the witnesses by whom he was charged: and, on the occasion of such meeting, each was allowed to put questions to the other: the judge present, and (except a clerk for minuting down what passed) no one else.

If so it be that cases may happen, in which, in the most highly penal class of criminal cases, questions put by an interrogator of this description may be conducive to the ends of justice,—so may it in all other classes of criminal cases: and if in criminal cases, so also in non-criminal. Whatever may be the demand for the use of it, the propriety of that demand will not be varied, either by the distinction between most highly penal and least highly penal cases, or by that between criminal on the one part, and non-criminal on the other.

Cases are not wanting in which, on the score of the direct ends of justice (in other words, in

respect of the merits of the cause), interrogation, if performed by the sort of interrogator here in question, promises to be more efficient than if originating from any other source.

A contradiction, real or apparent, takes place (suppose) between the testimony delivered by an extraneous witness, and that delivered by a defendant in the character of a witness, a plaintiff in the character of a witness, or another extraneous witness, called, whether on the same side, or (what is more apt to be the case) on the side opposite to that on which the first was called. By reciprocal interrogation, in which (on one side or on both) an extraneous witness takes a part, truth will acquire a better chance for being brought to light than it could have without this assistance: the seeming contradiction may be cleared up, or the incorrect testimony shewn to be so.

True it is, that the same end might be arrived at, without admitting any extraneous witness to perform the function of an interrogator; viz., by the instrumentality of the party, or his advocate.

But in the case in question it is only by means of the witness that the party can be apprised of the facts, or supposed facts, on which the questions are to be grounded. By interposing, between two individuals to whom (if to any body) the facts of the case are known, another individual to whom they are unknown; besides the useless consumption of time, no help to truth can be gained, and much help may be lost.

Both were present (suppose) at the same transaction: how prompt and lively in such a

case is the interchange of questions and replies on both sides! How instantaneously the points of agreement and disagreement are brought to view! How instructive is the *deportment* exhibited on both sides on the occasion of such a conference! Of the advantage possessed by the oral mode of extraction in comparison with the epistolary, much (as will be seen)\* depends on the promptitude of the responses—on the exclusion thereby put upon mendacity, serving reflection and invention. Interpose between the two individuals (both privy to the transaction) another who is a stranger,—both the advantages in question (viz. the promptitude of succession as between question and answer, and the *real* evidence furnished by deportment) are in great measure lost.

Other cases there are, in which the regard due to the interest of the witness himself (the proposed interrogator) calls for the admitting him to the exercise of that function.

1. The witness happens to have a collateral interest in the matter in dispute. In the testimony delivered by another deponent, (plaintiff, defendant, or extraneous witness on either side,) incorrectness has taken place to the prejudice of such collateral interest. The testimony (suppose) will be, or is liable to be, divulged and recorded.—It seems unreasonable, that, from a dispute having place between two parties, a third should suffer an irremediable prejudice. Here we see the case of a *special* interest: and an interest susceptible of almost as many

\* Book III. EXTRACTION. Chapter 8. *Modes of Interrogation compared.*

diversifications as any which can be at stake in the principal cause.

2. His reputation for veracity is, by the proposed interrogator, seen to be put in jeopardy by the incorrect statement delivered by another witness, as above. Why, for this any more than any other injury, should a man stand precluded from the means of self-defence?

Attacked in his person, the law would not refuse him permission to defend himself on the spot: the protection which it grants to his person, why should it refuse to his reputation? Here we see the case of a sort of *general interest*, the interest of reputation: or (to employ the denomination more in use in the language of evidence) of *character*.

Causes (says an objection) would at this rate grow out of one another, and thence litigation without end.

Nay (says the answer) it is not the demand for litigation, it is not injury, that would in this way be increased: it is only the means of redress for injury, that would in this way be afforded: redress rendered incomparably more easy and effectual than at present.

It is not by the fear of an excess, but by the fear of a deficiency, of litigation, that, under the fee-gathering system, this undilatory, unexpensive, and comparatively unvexatious, mode of redress, has been shut out. To open the door to such explanations would be to rip open the belly of the hen with the golden eggs.\*

\* In case of supposed perjury, for the purpose of eventual forthcomingness and justiciability, power has, by a special law, been given to the judge to commit the supposed

All three cases being accidental, and comparatively extraordinary; no doubt but that the admission of a witness to the faculty of interrogation must be committed to the discretion of the judge: grantable either of his own motion, at the instance of the party, or at that of the witness himself, according to the nature of the case, as above.

In the case of the party, liberty of interrogation is a matter of right: since a case cannot be figured in which it ought not to be allowed. Of the several distinguishable descriptions of witnesses, if to any one it were matter of right, so would it be to all: the consequence might be the most intolerable confusion. A *mala fide* perjurer on the spot, and to order prosecution at the expense of a public fund.

So far so good: but why not to try him, and convict or acquit him, on the spot? It may be, that, besides the evidence which gave birth to the suspicion in the bosom of the judge, the case affords other evidence which is not on the spot; in that case, the necessity of adjournment is manifest. But a state of things that may equally be, and probably most frequently is, exemplified, is, that the case does not afford, nor by the supposed perjurer would be so much as pretended to afford, any other evidence. In that state of things, the impropriety of adjournment is equally manifest.

After a lapse of months, hours are, in the postponed trial, employed in greater number than the minutes that would have been sufficient on the impromptuary one. Meantime, recollection fades, evidence perishes; and the question whether a trial shall so much as take place, rests on the arbitrary decision of a secret tribunal; which cannot know more of the transaction, and may, to any amount, know less, than the one by which, to so much advantage, conviction and punishment might have been made to attach instantaneously upon the offence.

The ends of justice take their chance: but fees, the objects of judicature, are made sure: objects, which in the other case would not, or at least need not, have existence.

plaintiff or defendant, by calling in adherents and confederates of his own in unlimited numbers, might swell the amount of delay, vexation, and expense, to any height.

One case, that of a party (say the plaintiff), made subjectable, on the occasion of delivering his testimony, to interrogation by a person whom he is about to call in the character of an extraneous witness, affords a particular objection on the ground of the danger of mendacity-serving information. By the supposition, the witness, the extraneous witness, has no interest, no avowable and rightful interest, in the cause. If then he be to be admitted to interrogate, it can only be in the character of an advocate; an agent of the party whom it is proposed he should interrogate. But, between the character of an agent and the character of a witness, there is a sort of incompatibility: on the part of an agent, partiality ought to be supposed; on the part of a witness, impartiality is a quality that ought to be cultivated and guarded with all imaginable care. To admit interrogation from such a quarter, is to incur a needless danger of bias or of mendacity on the part of the extraneous witness, and thus of mendacity-serving information from him to the plaintiff-deponent.

Answer:

1. From a man's being disposed to afford that assistance, the affording of which is consistent with the laws of probity, (viz. affording information in a direct way by his own testimony, and in a less direct way by questions tending to extract information from another person) it follows not that he will be effectually disposed,

or so much as at all disposed, to afford mendacity-serving information.

2. Between the character of a witness for one of the parties, and the character of an agent for the same party, there neither ought to be any such incompatibility, nor is in general in established practice; at any rate not in English practice. A man known to be an agent of the party, is admitted to depose at his instance, and in that respect on his behalf, without difficulty.

3. If the danger on this score were serious enough to be conclusive, excluding the witness from acting in this case in the character of an interrogator would not suffice to obviate it: for so long as any other person alike partial to the interest of the plaintiff (say the plaintiff-deponent's own advocate, say a fellow-plaintiff or his advocate) were permitted to interrogate, the same sinister end might be compassed, as well by the witness's communicating the proposed question to these allowed confederates, as by his propounding it himself.

Thus stands the matter on the footing of *sinister* interest; interest prompting the individual in question to promote the departure of the deponent from the line of truth. But in the case of an extraneous witness, (considered with a view to his appearance in the character of an interrogator) there exists a naturally-operating *tutelary* interest, tending to engage him to employ the information he is master of in framing questions the tendency of which will be to confine the testimony of the deponent within the pale of truth. The deponent has been delivering his testimony: the extraneous witness has had

communication of it, or heard or read the minutes taken of it : a passage that he has remarked in it strikes him as deficient (no matter from what cause) in correctness or completeness : in those respects, one or both, it disagrees with the testimony which he himself has delivered. Independently of all personal interest (honest or dishonest) in the cause; what desire can be more natural, what more general, than, by questions, or any such other means as are allowed, to interpose in the view of supplying the deficiency? Let the permission of satisfying this desire be allowed, a sort of contest springs up, a sort of combat takes place, between the deponent and the interposing witness : a clashing of counter-assertions and counter-interrogatories; a collision from which truth and justice have nothing to fear, everything to hope.

Instead of this immediate collision between the deponent and the proposed interrogating witness, substitute an examination performed by the party interested or his advocate, without other assistance than that of the proposed interrogating witness: who does not see that this operation will be, comparatively speaking, languid and ineffective? When two persons, each a percipient witness of the transaction of which they both speak, stand up in contradiction to each other, the guard of artifice is beat down: mendacious invention, unable to find apt matter at such instantaneous warning, is confounded, and driven into self-contradiction, or self-condemning silence.\*

\* The same reasons will serve to shew that a plaintiff, on the occasion of his delivering his testimony, should be subjectible to interrogation, even by or in behalf of a fellow

For the deponent, instead of the plaintiff (as above), put the defendant; making at the same time, in the description of the interrogator, the correspondent changes: you will find the arrangement subjecting him to be interrogated by the three other sort of persons proposed in that quality, recommended by the same reasons.

Such and so various are the descriptions of persons by whom it may be of advantage to the interests of truth and justice that the process of interrogation should be performed. Performed, and to what purpose? To the purpose so often mentioned, viz. that of making what provision can be made for the completeness, as well as correctness, of the aggregate mass of evidence.

And in what view and intention were these several classes of persons looked out for?—In the view of collecting the requisite stock of appropriate skill and appropriate information: whatever skill (derived from experience) might reasonably be looked for as requisite and sufficient for the purpose, applied to whatever information the particular circumstances of the individual case might happen to afford.

But without the requisite share of zeal to put those means into action, and give them a suitable character, all the skill and all the in-

plaintiff. If the interest of the fellow-plaintiff coincide with that of the plaintiff who is about to depose, there is at any rate the chance of additional skill, added to that of additional appropriate information: if the interest of the fellow-plaintiff is different in any respect from that of the plaintiff who is about to depose, the situation of the fellow-plaintiff coincides in that respect with that of a defendant. On the score of danger of mendacity-serving information, the same objection as above may be brought, and the same answer may be given to it.

formation imaginable would still be of no use. It was for this purpose that all the distinguishable interests, which, in each individual case, the nature of the case might happen to afford, were carefully looked out for: for, supposing any one such interest left out, and the case so circumstanced as to afford a fact which no other but that interest would prompt an interrogator possessing the requisite share of skill and information to call for,—the necessary consequence is that *pro tanto* the mass of evidence remains incorrect or incomplete: and howsoever it may fare with other persons having other interests, misdecision and injustice to the prejudice of the possessor of that interest will be the probable consequence.\*

\* Whatever be the number of persons whose interest in any shape is at stake in the cause, each having a separate interest, and demanding to be allowed to do whatever may be lawful and necessary for the support of such his interest (be his demand positive or defensive), there is as much reason for acceding to one such demand as to another. *Audi alteram partem*—hear the other side—is the phrase by which this universally applicable and universally undisputed conception appears commonly to have been expressed: such, at least, is the interpretation which that maxim requires to be put upon it, ere it can be admitted to have embraced on this ground, to their full extent, the exigencies of justice. By *altera pars*, understand every separate interest: for each part, each interest, is *altera* with reference to every other. Under *audi* comprehend the giving allowance to every lawful act, the performance of which is necessary to the support of each such interest. To adduce or exhibit sources of evidence, is one such act: to take a part in the extraction of the evidence from the several sources adduced, by whomsoever adduced, is another: to present to the judge observations on the evidence so extracted, is again another. In any given cause, if the allowance of any one of these operations be necessary to justice, so is that of every other: if in any one cause the

Thus much then is, I flatter myself, pretty clearly understood : viz. that when all the inte-

allowance of them all is necessary to justice, so is it in every other. If, among three operations such as these, to all of which it may happen to be necessary to justice that they should be respectively performed, there be any one which is less certain of being necessary than the two others, it is the one last mentioned, viz. that of presenting observations. The testimony of Titius, in the character of an extraneous witness, may of itself be so correct and complete, as to supersede all demand for skill and labour to be employed in the extraction of any supplemental testimony from the same source: its application to the demand may at the same time be so plain and obvious, as to render it plainly impossible for it to receive any additional persuasive force from any observations that could be grounded on it. Scrutinized or unscrutinized, evidence may speak, and speak sufficiently for itself: but in a question of fact, observations without evidence would be a discourse without a subject.

Such, and no less extensive, is the import which it seems necessary to give to this most familiar of all judicial adages, ere it can be rendered commensurate to the ends of justice: I say familiar, for, between the being familiar to the ear of every man, and the presenting a clear conception, and that the same conception, to the mind of every man, there is (in most questions of the field of morals, and more especially of the field of jurisprudence) a most wide and lamentable difference.

Very different is the import affixed by the professional lawyer to the word *audience*. According to his conception of the matter, (at least as far as conception is to be understood to be well interpreted by practice), there is indeed a *one thing needful* to justice, but it is not any one of these three.

Let every party, let every person, who claims to have an interest in the cause, be heard by counsel: which again, being interpreted, is,—let matters be so ordered, that every man, on pain of seeing his interest perish, shall be admitted (that is, shall be compelled) to employ a lawyer; that is, to employ a multitude of lawyers of as many different sorts as possible, to make their observations on the cause. If these observations have any evidence for their ground, so much the better, and the more evidence the better; because, the more evidence, the more ample the ground and room for observa-

rests at stake in a cause are comprehended, and the faculty of interrogation allowed to the possessors of those several interests without exception, over and above the faculty of adducing

tions : if labour be applied to the extraction of the evidence from those sources, so much the better, and the more labour the better; because the more abundant the labour, the more abundant the source of reward. Provided they are accompanied by the observations, (understand always from the professional quarter above designated), any or all of them may have their use : but without all these documents, or any of them, the observations (provided always it be from that quarter that they come) are of themselves capable of answering every purpose that is worth providing for: without the observations, neither any one of them nor all of them put together, have any claim to notice.

But, above all errors, take care at any rate not to fall into so gross a one as that which for *pars* on this occasion would understand *party*,—each of the several parties in the cause. Unless it be here and there in the station of witnesses, these, of all others, are the persons who, from the beginning to the end of the cause, are neither to be seen nor heard in it: not to bear a part in the extraction of the evidence, still less for the purpose of presenting observations grounded on it.

Such are the commands of scientifically-instructed justice. Let no man, on any occasion on which it is possible to prevent his being heard, be heard in any way by himself: let every man be compelled to be heard on all manner of occasions, and in all manner of ways, by counsel: this is the one thing needful: so counsel be but heard, what he has to say when he is heard is of minor consequence; and so this one thing needful be but performed, whether there be evidence or no evidence, and whether the evidence (if there be any) be correct or incorrect, complete or incomplete, is not worth a thought on the part of the judge: understand of a judge professionally bred and instructed, the only sort of judge who is entitled to the name.

Such is the interpretation put upon the maxim *audi alteram partem* by the professional lawyer; by those from whose lips interpretation has the force of law. Will proof be asked for? The answer is, *Circumspice*.

such testimony as they themselves may happen to have it in their power to adduce; the best provision is made that can be made for correctness and completeness (so far as information and zeal at least are concerned): and that, on the other hand, while there be any one such interest to which that faculty is denied, the provision made is imperfect, and pregnant with deception, misdecision, and injustice.

But what (I think I hear an English lawyer crying out and saying)—what is all this but a round-about way of observing that in every cause *cross-examination* ought to be allowed?

In answer, what may be admitted is, that, towards conveying the conception above meant to be conveyed, this word (to which no equivalent seems to be afforded by any other language than the English) does more than can be done by any other single word in actual use.

What on the other hand requires to be observed, is, that, had this word and no other been employed, the conception conveyed by it would, as well in point of correctness as in point of completeness, have been in no slight degree discordant with the truth of things; for,

In the first place, the salutary effect in question will be seen to be obtained in a variety of cases in which no such operation as that denoted in English practice by the word *cross-examination* is performed.

In the second place, cases will be seen in which an operation called by the name of *cross-examination* is performed, and the salutary effect in question is either not promoted at all, or promoted in a mode and degree very imperfect in comparison with that which is generally

understood as attached to the performance of the operation so denominated.

There is another and a perfectly sufficient reason, for not being contented with saying that cross-examination should be allowed. This work, if it be of any use to any one nation, may be of no less use to any other: if it be of any use to-day, its use will not be obliterated by cycles of years succeeding each other in any number. If, to the substance of the practice denoted in the English language by the word cross-examination, there be attached (as it appears to me there is attached) a virtue in a peculiar degree salutary to justice; it would be too much to say or to suppose that an acquaintance with the language of this small part of the globe is indispensable to it; that it is only by understanding English that a man can understand what is necessary to justice.

Thus extensive, and in themselves occasionally almost unbounded, are the demands presented by the direct ends of justice: the latitude demanded in respect of the number of persons to be admitted to the faculty of interrogation, to make it absolutely sure, that of the persons (whatsoever may be their number) having each a separate interest in the cause, no one shall be exposed in any degree to suffer for want of it.

But on this as on every other occasion, the operations prescribed by the direct and ultimate ends, find their necessary limit in the regard due to the collateral end, of justice. On this as on every other occasion, care must be taken—taken by the legislator, and discretionary power in corresponding amplitude allowed by him to the

judge,—that, for the avoidance of a possible mischief in the shape of a misdecision, a certain and immediate mischief be not admitted to a preponderant amount in the shape of delay, vexation, and expense. But for this, the number of persons standing together on the defendant's side of the cause, and possessing each a distinguishable interest, might, by the nature of the cause, be every now and then swelled to such a pitch, that, by conjunct operation (with or without concert and conspiracy), the value of the service demanded, (how considerable soever,) might eventually, or even to a certainty, be overborne by the weight of the delay, vexation, and expense thus attached to the prosecution of it; and thus, sooner or later, (over and above all the collateral inconvenience), direct and certain injustice to the prejudice of the plaintiff's side would be the necessary result.

On the part of the judge exists the requisite allotment of skill: this, provisionally at least, must all along be supposed. At the command of the judge lies the whole stock of information which, in each individual case, the nature of the case affords; for this may all be supposed: understand always, in so far as the information possessed by one man can, to this purpose, be deemed with propriety to be in possession of another.

In the exercise of judicature in every country; among the occupations of the judge, among the obligations which the judge is expected to fulfil, is that of applying that skill and that information to the discovery of the truth through the medium of evidence. If, then, interrogation be indeed, as it was not denied to be, an apt instrument

for that purpose; why, it may be asked, look out for any other hands to lodge it in? What is there in his station to hinder him from employing it? and employing it to the utmost advantage to which it is capable of being employed?

What should hinder him? Two deficiencies: —deficiency in respect of two out of three endowments (not to speak here of probity),\* the union of which is necessary to the discharge of this function to the best advantage: appropriate information, and zeal.

1. Appropriate information: for the faculty of obtaining possession is not itself possession: to have a chance, and but a chance, of possessing a thing some days hence, is not the same thing as the actual possession of it at this very instant: information at second hand is not the same thing as information at first hand. These considerations have already been mentioned among the reasons for allowing the judge to admit a witness to the exercise of this function, as well as a party or his advocate.

2. In the article of zeal, the inferiority of the judge, as compared with the party, is not less obvious or undeniable. Equality in this respect is an endowment which seems hardly to be

\* If, on the part of the judge, improbity (which in this case will be a determination or inclination to decide in favour of one side or other, in opposition to the dictates of justice) be supposed; the chance in favour of justice is, in this case, reduced perhaps even lower, than if, the judge being excluded, the right of interrogation were allowed exclusively to the party on one side. For the judge, by the supposition, in point of affection, is, in this case, what the party would be in the other: and for giving effect to his sinister views, the judge possesses powers of which the party is destitute; powers adequate to the accomplishment of the sinister ends.

wished for, were it even attainable : as being incompatible with that characteristic calmness and impartiality, for the want of which no other endowments can atone.\*

In this general point of view, the deficiency natural to the station of the judge is, indeed, sufficiently obvious : although in Roman practice the recognition of it has not had any such effect as to have produced (except in a comparatively narrow case) the communication of any share of it to any other of the stations in the cause ; that of a party or that of an extraneous witness.

But what is not quite so obvious, nor is yet altogether unworthy of remark, is the different degrees of zeal which, in causes or enquiries differently circumstanced, will naturally be apt to infuse itself into the station of the judge.

1. In one class of causes, and that more numerous than all the others put together, his zeal may be set down as being naturally at its *minimum*. This is the class of causes between man and man ; the class composed of non-criminal causes.

Not but that even here the indifference so

\* Another remark : to extort the truth from the bosom of an unwilling, an unscrupulous, and strong-minded witness, is among the most of difficult tasks ; and a pre-eminent degree of fitness for it is one of the brightest and rarest accomplishments that the war of tongues affords to natural talent improved by practice. The judge (as such) never having been, by any motive force equal to that under the action of which the advocate is continually operating, excited to those exertions which are necessary to the exercise of that function with a superior degree of efficiency and success, cannot reasonably be expected to be on a par in this respect with an advocate whose stock of experience has been equally abundant.

natural, and frequently so observable, in the situation of the judge, may be referable in no inconsiderable degree to a collateral and not altogether inseparable cause : viz. the natural state of procedure under the technical system ; which, in these cases, never fails to afford, on some terms or other, to each of the persons an advocate, or advocates : one sure way of realising which state of things, is the refusal to listen to the party unless he employs an advocate.

In this state of things, by one sort of interest, to the action of which the judge, like every other man, is continually exposed, (viz. the interest corresponding to the love of ease), he is continually urged to get through the business with as little trouble to himself as possible. Here then we have a sinister interest, which, (supposing it to stand alone, or without being encountered by any interest, acting in a tutelary direction, of sufficient force to overcome it), will be sufficient to render the faculty of interrogation, as far as he is concerned, altogether nugatory.

In the view that will come presently to be taken of the existing modifications of technical procedure, we shall see this sinister interest acting with very little opposition from any tutelary one : but of this in its place.

In the employment of this instrument to the best advantage, the advocate, in so far as he is admitted to wield it, has an obvious, and in a considerable degree efficacious, interest ; his bread, in many cases, depending on his professional reputation ; and the reputation of the advocate having a natural and intimate connection with the success of the client.

In this interest, the judge, it is evident, has

not the smallest share. His reputation is, indeed, in a certain degree, dependant on the apparent justice and propriety of his decisions ; and on their actual, in so far as their apparent depends upon their actual, justice. But the apparent justice of a decision grounded on a body of evidence depends upon that evidence : depends upon the evidence, not as it might have been, but as it is. In this state of things,—so long as the evidence, as collected by him, does not *appear* to be either incorrect or incomplete,—in what degree it really *is* so, is to the interest of his reputation a matter of indifference. Moreover, so far as appearances are concerned, everything depends upon publicity : insomuch that, supposing perfect secrecy, it is with this part of the business as with every other ; let it be done as well as possible, or as ill as possible, his reputation is exactly in the same state.

2. The case in which the zeal of the judge on this occasion may be expected to be found at its *maximum*, is that of the species of procedure already described under the name of inquisitorial procedure.: a case which comprehends the whole of the criminal branch,—in so far as the business of receiving, collecting, and investigating the evidence against the defendant, rests (especially if it rests exclusively) in the hands of the judge,—without any co-operation, or at least without the necessity of any co-operation) on the part of any other person in the character of prosecutor (the name, in this branch, given to those who act on the plaintiff's side of the cause).

In this case, that in the article of zeal there should be any considerable deficiency on the

part of the judge, will not, on a general view, be found natural to the case.

To repress his activity, the same *vis inertiae*, the love of ease, is operating, in this as in the other case: but in this case it is natural to it to find counter-forces (and these adequate to the surmounting of it) such as do not apply to that former case.

Here is an end to be accomplished; an end which (setting aside particular and casual interests and affections) men in general have an interest in seeing accomplished, and an interest which, in some degree or other, is pretty generally felt; by the judge himself, along with the rest: and his is precisely that particular situation from which the general interest will naturally be viewed in one of its strongest lights. To accomplish this end is a task committed, and universally known to have been committed, to his charge: a task not forced upon him, but voluntarily accepted by him along with the other functions attached to his office: his reputation for professional skill, as well as industry, is attached to the due execution of this power, and, in the case of real delinquency, to the successful execution of it.

Under these circumstances,—to produce a considerable, and in general an adequate, degree of zeal and exertion on his part,—neither to excite it in the first instance, nor, *à fortiori*, to keep it up, is any such interest as pecuniary interest, in the shape of a mass of fees depending in any way upon success, necessary. Of the hunter who toils the whole day to catch a stag or a fox, whom he lets go as soon as caught,

the zeal is neither awakened nor kept up by any such project as that of fees.

In so wide a field, general principles of action are liable, in certain cases, to be overborne by particular ones. But, upon the whole, that in this case the situation itself is literally adequate to the production of the quantum of zeal requisite for the effectual discharge of the function, directly and principally attached to it (viz. the receiving, collecting, and investigating, and, by means of the instrument of interrogation, giving correctness and completeness to it) at least in so far as the operation of the evidence tends to bring about the conviction of the real delinquent, seems pretty generally testified by experience.

In this view may be cited, 1. Under the Roman system, the conduct of the business, from beginning to end, in the case of those crimes of high degree, which, affording no individual prompted by peculiar interest to take upon himself the vexation and expense attached to the station of private prosecutor, are left to be prosecuted for, as well as decided upon, by the judge. 2. Under the English system, the preparatory inquiry conducted by a justice of the peace, in the case of a crime of the rank of felony. 3. Under the same English system, the enquiries conducted by tribunals organized on special occasions for special purposes: whether by the authority of either house of parliament, under the name of a committee; or under the authority of the whole legislature, under the name of a commission of enquiry.

Excess rather than defect of zeal has in

these cases been the more frequent topic of complaint. In the case of that tribunal (the inquisition) to which the denomination of this species of procedure has become attached,—as if it were the only tribunal in which the two functions of prosecutor and judge had ever been united,—the complaint has risen long ago to a height become proverbial.

It is from the abuse made of the faculty of interrogation, on the occasion of its being applied to the disastrous purpose there in view, that criminals of all sorts, co-operating in this way without, the need of concert—criminals of all sorts, with their accomplices after the fact, and abettors, of all sorts—have taken occasion to labour, and with but too much success, in deluding the public mind, and setting it against the application of the same instrument to the most necessary purposes: laboured, and with as much reason, and even appearance of reason, as if their endeavour had been to stamp the like infamy upon the power of judicature itself, or upon the use of the interrogative mood as applied to any of the other common purposes of social intercourse.

Though interrogation by the parties is of itself, in general, a more effectual security than interrogation by the judge, the former, nevertheless, does not supersede the latter.

Though, in respect of special information applying exclusively to the facts appertaining to the individual cause in hand, the parties will (one or other, or both of them) be better qualified for the task than the judge; yet, in many instances, the superiority of general informa-

tion, discernment, and promptitude, naturally resulting from the superiority of experience, will enable him to bring to light facts, for want of which the testimony would have been incomplete, or mendacity, if employed by the witness, would have escaped detection. In no case, it is evident, can such assistance be deemed superfluous: but there are various circumstances by which the demand for it may be increased: if there be any deficiency in point of intelligence or exertion on the part of the advocate on either side: if on either side there be no advocate,—and the party (by mental weakness the result of sex, age, bodily indisposition, want of education, natural dulness, and so forth) be in any particular degree disqualified from conducting his own cause with due advantage.

As to zeal; though in this point the judge cannot reasonably be expected to be upon a par with the party interested; yet, with the advantage of professional education and experience, a much inferior degree of exertion will frequently enable him to render much more effectual service: so that, upon the whole, in the character of an interrogator, the judge, though but an inadequate substitute, may, with reference to the party, be deemed an indispensable assistant.

**SECTION V.—*Affections of the several proposed interrogators and respondents towards each other, how far presumable.***

Such or such a person in the character of an in-

terrogator, shall it be permitted to him to interrogate such or such another person in the character of a proposed respondent? To settle the answers to these several questions is one practical use of the double list of proposed respondents and interrogators.

But, in judicial practice, rules have been grounded on the supposed affections of this or that person in the character of a respondent, to this or that other person in the character of an interrogator, or *vice versâ*: rules prohibiting or allowing such or such a mode of interrogation in the several instances.

Here then we have another practical use of the list: enquiring into the nature and solidity of the grounds for ascribing to such or such a situation such or such a state of the affections; and thence into the propriety of the prohibitions and permissions respectively administered by these rules.

In most instances we shall find ground for a presumption, ascribing to a party in one of these situations, with relation to a party in such or such another of these situations, such or such a state of the affections. But in each of these instances it will be manifest, that, from one cause or another, such presumption is liable to fail: from which inconclusiveness and uncertainty, follows, in every instance, the impropriety, whether of prohibition or of permission, if established by any such peremptory and unbending rule.

1. Proposed respondent an extraneous witness called by the plaintiff; proposed interrogator, the plaintiff or his advocate.

The superior probability is, that the affections

of the proposed respondent are either neutral, or favourable as towards the side from which the interrogation proceeds. For, supposing the party to have his choice of witnesses, he will pitch upon such as he expects to find favourable to him, or at least neutral : he will avoid calling such as he expects to find adverse.\*

\* Independently too of all other causes of favourable partiality, there is something in the relation between party and witness that has a tendency to conciliate the affections and wishes of a witness to the side of that party by whom his testimony is called in.

1. Confidence, as being a mark of esteem, has, by the force of sympathy, a tendency to produce good will on the part of the individual towards whom it manifests itself.

2. In proportion to the importance of the cause to the party, and of the evidence to the cause, the witness is placed by the party in a situation of superiority with relation to himself, himself in a situation of dependence with reference to the witness. A species of power, with the pleasures attendant on that possession, is thus conferred upon the witness, and conferred upon him by the party. Hence another source of good will, produced by the power of sympathy.

3. In proportion to this double importance, is that of the part which the witness is, by the choice thus made of him by the party, enabled and called upon to act. A species of distinction, a situation of honour, is thus conferred upon the witness, and conferred upon him by the party, as before. Hence another cause of good will, produced by the power of sympathy, acting in the shape of gratitude.

4. Where witnesses are called in on the same side in numbers, a sort of party is formed, animated by the spirit of party, and a sort of social and more extended sympathy is thus generated, and adds its force to that of the personal sympathy of which the individual is the object. This effect will of course be the more conspicuous where the cause itself has anything in it of a public or semi-public nature : where, instead of an insulated individual, an entire class (more or less extensive) has a direct and common interest in the event. But even when there is no common interest, it does not follow that the effect will not be produced. In an election riot, a

But this probability, such as it is, is manifestly much exposed to failure. It is not of course, and always, that a party has any such choice of witnesses : those cases which afford no such choice are the most apt to be productive of legal dispute. Of whatever number of distinct facts it may be necessary to the plaintiff to prove, if there be a single one which cannot be proved by any other evidence than the testimony of a witness rendered adverse to himself by any repugnancy of interest or cause of antipathy, or (what comes to the same thing) rendered amicable towards the defendant by any tie of interest or sympathy ; he must either give up his right altogether, or, instead of finding the road to information smoothed by the neutrality or sympathy of the proposed respondent, find it obstructed by his ill will and reluctance.

2. Proposed respondent an extraneous witness called by the defendant ; proposed interrogator, the defendant or his advocate.

Under these different names, to the purpose here in question, this second case is in substance the same as the first.

3. Proposed respondent a plaintiff ; proposed interrogator a co-plaintiff or his advocate.

Here the presumption is, that the affections of the proposed respondent are not merely neutral, but highly favourable to the proposed interrogator, and *vice versa* : because here, in respect of the cause itself, is a declared community of interest.

passer-by, seeing an affray, resolves to have a share in it : before he began, it may have been a matter of indifference to him with which side he should take part, but he will not shout Blue or Yellow the less lustily afterwards.

In this third case, the presumption, it is evident, is much stronger than in either of the two former.

But here also it is liable to failure. 1. Under the apparent bond of union, an original opposition of interests may be concealed.\* 2. The declared interest which the proposed respondent has in common with the proposed interrogator, may be outweighed by some undeclared and secret opposite interest: or, between the proposed interrogator and a party or parties on the other side of the cause, collusion may have place.†

4. Proposed respondent a defendant: proposed interrogator a co-defendant or his advocate.

Presumption here the same as in case 3: causes of failure also the same. But in this fourth case the presumption is weaker; the existence of a cause of failure being more probable. For, without his own consent, no man can be made a plaintiff; any man a defendant. Into the station of defendant it rests with any individual in the character of plaintiff to force any number of individuals actuated by mutually opposite interests.

5. Proposed respondent a witness called by the defendant: proposed interrogator the plaintiff or his advocate.

Here the presumption is, that the affections

\* Example *in civili*. Two persons, each in the character of creditor, join in making a demand upon a testamentary executor or other manager of an insufficient fund: it is the interest of each that the other should fail in the proof of his debt.

+ Example *in criminali*. Two persons join in the prosecution of a supposed criminal: one of them, for money or through compassion, is secretly determined to endeavour to bring about the acquittal of the defendant.

of the proposed respondent are adverse to the proposed interrogator. But, under the first case, it may already have been seen in how high a degree, in the present case also, that rule is exposed to failure.

6. Proposed respondent a witness called by the plaintiff: proposed interrogator the defendant or his advocate.

What belongs to this sixth case may be seen in what has been said of the last preceding one.

7. Proposed respondent a defendant: proposed interrogator the judge.

Here the presumption—the first presumption at least—is, that, as towards the defendant, the affections of the judge are neutral.

But where the case has been a criminal one, and more particularly of the most highly penal class, under the secret modes of enquiry which have been generally in use in the Roman school; the judge, in many instances, uniting to that neutral the partial function of plaintiff; a suspicion that has trod fast upon the heels of that presumption is, that an occasional wish has place on the part of the judge, (whether in prosecution of his own inclinations or those of some other member or members of the government), to find pretences for misdecision to the prejudice of the defendant's side.

After the above exemplifications, the extension of the enquiry to the several other diversifications of which the relation as between proposed respondent and proposed interrogator is susceptible, will, it is imagined, be found to present but little difficulty.

### SECTION VI.—*Distinction between amicable interrogation and interrogation ex adverso.*

Not for completeness only, but for correctness likewise, suggestion *ab extra* such as it is of the nature of interrogation to afford, and occasionally perhaps almost any suggestion that it is in the power of interrogation to afford, may be necessary; and this, whatever may be the state of the interests or affections of the respondent, as towards the person by whom, or in whose behalf, he is interrogated.

It may be necessary, where the affections of the respondent are indifferent, or even partially favourable, as towards the interrogator: for, on any ordinary occasion on which you seek for information (if the subject be of a certain latitude) apply to your most intimate friend—let him be fluent in speech as well as communicative in disposition—how seldom will it happen that a single question (how comprehensively soever framed) will be sufficient to draw from him all the information you wish to receive!

Interrogation from an interrogator between whom and the respondent the affections are in either of these states, may, to distinguish this case from the opposite one, be termed amicable interrogation.

But the case in which the demand for this security is by far the stronger and more conspicuous, is that where between the two interlocutors there exists a contrariety of interests or affections.

Interrogation in this case may be termed *adverse* interrogation: interrogation *ex adverso* or *e.r opposito*.

In a former section, different descriptions of persons, in considerable and almost indeterminate variety, have been brought to view, as being upon occasion capable of rendering service to justice by contributing to the extraction of the light of evidence: in particular, the parties on both sides (with their representatives), the judge, and extraneous witnesses.

In the language of English law, there are two descriptions of persons, and but two, from the consideration of whose relation to the cause the operation of interrogation or examination receives a particular denomination. When the deponent (being an extraneous witness) is interrogated at the instance of the party by whom his testimony was called for, he is said to be examined *in chief*—his examination is stiled the examination in chief: when, immediately after such his examination in chief, he is interrogated on the part of a party whose station is on the opposite side of the cause, he is said to be *cross-examined*: the examination is termed his cross-examination.

Attached in general to the circumstance of his being examined by that side of the cause by and from which his testimony was called for, is the notion of his affections being favourable to that side of the cause, and thence of a willingness on his part to give a correspondent shape and complexion to his responses. Attached in like manner to the circumstance of his being examined on that side of the cause which is opposite to that by and from which his testimony was called for, is the notion of his affections being unfavourable to that side of the cause, and of a corresponding adverse shape and complexion given to his responses.

And, from this supposition, practical rules of no slight importance have been deduced.

Were this notion uniformly correct, then, and in that case, examination *ex adverso* would be synonymous with cross-examination. But we have already seen how far this notion is from any such uniform correctness.

To the supposition of an agreement or disagreement of interests, that of a correspondent relation of affections naturally attaches itself. Concerning this relation (of whichsoever of the two opposite kinds it be), the natural supposition is, that it is mutual, and even (in default of reasons to the contrary) equal. Neither this equality, nor even that mutuality, is, however, as is sufficiently known to everybody, constantly verified in practice. When either the term amicable interrogation, or the term adverse interrogation (or rather interrogation *ex adverso*) is employed, then the above noted irregularities ought not to be overlooked.

Where the exertions of one of two parties (the interrogator) are employed in the endeavour to bring to light a fact, or other object, which the exertions of the other party are all the time employed in the endeavour to keep back; on the part of that one of them on whom the force is thus endeavoured to be put, the existence of an emotion of the angry kind, to a degree more or less intense, can scarcely be supposed to be altogether absent: more especially if, with reference to the respondent, the obvious consequences of the disclosure be of a nature decidedly and eminently penal; such as the loss of property, liberty, reputation, or life.

At the same time, on the part of the interro-

gator, on that same afflicting occasion, the superposition of an emotion of the angry kind (looking towards the unhappy respondent) is far indeed from being a necessary one: as in the case where, on that same occasion, the melancholy function is in the hands of a humane and upright judge.

To warrant the employment of this necessary term, it therefore is not necessary that the emotion or the natural ground should exist on the part of both interlocutors: it is sufficient, if it exists on either part. Be it reciprocal, or but unilateral, in either case there will be the same reluctance on the part of the respondent; the same sort of unwillingness as to the yielding the information which it is the endeavour of the interrogator to extract: the same psychological difficulties and obstacles will therefore be exerting their force in the endeavour to prevent the testimony from possessing that degree of completeness and correctness with which, for the purposes of justice, it is so necessary that it be endowed.

Nor is this sort of dialogue between interlocutor and interlocutor, the only relation by which the sort of opposition above described, and the consequent danger of incompleteness and incorrectness, is liable to subsist.

The interrogator being a party (say the defendant), let the respondent be an extraneous witness, called by an opposite party (the plaintiff), and already interrogated by or in behalf of that party: and, in point of affections, let the witness be, with reference to each party, altogether unopposite; equally indifferent to both, or equally a friend to both. The string of

questions put to the witness being completed; will his evidence be altogether correct, as well as complete? Correct, seldom; complete, still more seldom. Why?—Because, in quality as well as quantity, the facts delivered by the respondent will naturally have been influenced, more or less, by the nature and object of the questions; and hence by the object which the interrogator had in view: and the object which the interrogator had in view probably embraced the keeping back a part (more or less considerable) of the facts considered as likely to operate to his prejudice; and almost to a certainty did not embrace the bringing forward any such facts.

In this case, then, the interrogation,—though not adverse with relation to any interest, or affection, or emotion, of the person interrogated,—may, with not the less propriety, be termed interrogation *ex adverso*: *ex adverso*, with relation, not to the respondent himself, but with relation to an antecedent interrogator.

In the case just put, the affections of the respondent were, with reference to the party by or in whose behalf he is under interrogation, supposed to be in a state of indifference. But a case not less natural, and indeed considerably more natural, is a state of favourable partiality. In this case, the obstacles tending to prevent the completeness and correctness of the testimony, the obstacles which the interrogator has to contend with, act (it is evident) with additional force.

On the other hand; while it is certain that the interests and affections of the preceding interrogator will be opposite, with relation to the

interests and affections of the succeeding interrogator; a case which, though comparatively unfrequent, is notwithstanding sometimes verified, is, that the affections of the witness shall be partial in favour not of the party by whom he was called, but of the party adverse to the party by whom he was called.

This being the case; the force tending to produce incorrectness and incompleteness on the part of the testimony,—the force against which the second interrogator has to contend,—this force, considered in respect of its dependence upon the state of the affections of the three several individuals bearing a part in the business, admits of three cases or gradations: Case 1. The respondent favourable to the second interrogator: Case 2. The respondent indifferent: Case 3. The respondent adverse to the second interrogator.

When the respondent is a mere witness (an extraneous witness), himself without interest or affection in the cause; on the part of the judge, the process of interrogation is scarcely susceptible of either of the pair of adjuncts, amicable or adverse. The witness has no desire to keep back anything: the judge has, or at least ought to have, a desire to get out everything: every fact and circumstance (in favour of whichever side it may chance to operate) that promises to be material to the cause. To prevent the judge from getting whatever evidence the source affords, there is nothing on his part but want of skill, want of appropriate information to direct his interrogatories, and deficiency of zeal, as above.

When the respondent is a party; the judge,

in the character of an interrogator, cannot fulfil his obvious and acknowledged duty,—cannot do in every instance what depends upon his exertions, towards giving completeness and correctness to the aggregate mass of testimony,—without occasionally presenting to the party (according to the nature and tendency of the fact sought—according to the side in favour of which it operates) two opposite aspects: the one amicable, the other adverse: amicable, in so far as the fact sought-for promises to operate in favour of the respondent's side; adverse, in so far as it promises to operate against that side, or (what comes to the same thing) in favour of any opposite side.

Of the questions put by the judge to an extraneous and indifferent witness, not one (it has just been observed) can be termed either amicable or adverse in relation to such respondent witness. But, of the same questions, not one, (so it be material to the purpose) can fail of being at once amicable and adverse, with reference to the parties: amicable, with relation to the one; adverse, in the same degree, with relation to the other.

In a criminal case—at least if it be of that class of criminal cases which presents no individual in the character of a party injured,—there being but one individual whose interest is at stake, (viz. the defendant); in the language naturally employed on this occasion, that one individual is the sole object in view: and he, and he alone, is the party with relation to whom the adjuncts *amicable* and *adverse* are employed.

Considered then with relation to this individual, it will be always true to say, in speak-

ing of the whole string of interrogations put to him by the judge, that the aspect manifested by the judge, in respect of them, to the defendant, ought to be at once *amicable* and *adverse*: and on this occasion each of these adjuncts may be employed with propriety, so the other be at the same time employed with it; neither can, without the most flagrant impropriety, be employed alone.

That, in respect of his interrogatories, the aspect of the judge ought to be *adverse* to the defendant, (who, in a case where the arrangements of procedure bring him into court in a state of confinement, is called, in the language of English law, the prisoner), if nothing be said of what it ought to be on the other side,—is a proposition too monstrous, too revolting, to have ever been advanced. How often soever it may have been pursued in practice, in discourse no such monstrous maxim has ever been professed.

That, in the same respect, the aspect of the same public functionary ought to be *amicable* to the prisoner, in the sense just mentioned as attached in this case to the term *amicable*, (the same silence being observed as to the opposite aspect, with which it is necessary it should be accompanied, if it be reconcileable to the ends of justice), is a proposition equally monstrous, though in an opposite way; and equally repugnant to the ends of justice; but, unhappily (such has been the weakness of the public mind) not equally revolting: and it is under favour of this weakness that currency has been given to one of those sophisms, under which, by the artifices of hypocrisy, the grossest selfishness and the most sordid corruption have succeeded in im-

posing themselves upon mankind under the names of humanity and virtue.

I speak of the current maxim—that the judge ought to be of counsel with the prisoner: meaning the defendant, in a prosecution which subjects the defendant to provisional imprisonment for safe custody. This proposition, being in one sense indubitably true and consonant to justice, but liable to be taken, and most commonly taken and applied, in a sense in which it is false and hostile to justice, bears no inconsiderable part among the causes that concur in keeping up the stock of crimes in its present state of abundance.

In every cause, there are at least two sides; that of the plaintiff, and that of the defendant. In every cause it is the indisputable duty of the judge to do what depends upon him towards bringing to light all the material facts which the cause is capable of furnishing: whatever facts make in favour of the one side, whatever facts make in favour of the other. To apply his endeavours to bring to light such of the facts as promise to operate in favour of that side of the cause on which he is engaged, is, at any rate the function (not to enter into the question of duty) of the counsel, the advocate, on that side—in favour of the defendant's, the prisoner's side, when engaged on that side. In this sense it is the equally indisputable duty of the judge to be of counsel with the defendant. His duty?—yes: but on what condition?—on condition of being of counsel in the same sense, and to the same purpose, on the opposite side: on the side of the prosecutor, or other plain-

tiff. On every occasion, and to whatever purpose,—on which side soever the truth promises to operate, it is his duty to use his endeavours to bring it out. Giving this double direction to his endeavours, he serves both sides of the cause.

Now, of the man who serves both of the opposite sides of a cause, it cannot be denied but that he serves each of them. Take which side you will, it cannot be denied but that he serves that side : it cannot be denied but that he acts as counsel on that side.

Here then lies the mischief. Beneficial and justifiable in one sense,—the proposition is employed in another sense, in which it is pernicious and unjustifiable. It is only on condition of his occupying himself with equal industry in favour of the opposite side, that it is the duty of the judge—that it is otherwise than a crime in the judge—to occupy himself in the way in question, or in any other way, in favour of the other. Set aside this indispensable condition, it is a crime on the part of the judge to occupy himself in favour of either side. In point of propriety, next after impartial activity comes impartial negligence.

Fairly translated, stripped of its disguise, what is the argument of this sophism?—It is the duty of the judge to be impartial—therefore it is his duty to be partial.

Question of duty once more set aside ; it is the function, at any rate it is the constant occupation, of the counsel for either side,—of the counsel for the defendant, of the counsel for the prisoner,—to use every endeavour that the law

does not forbid, towards procuring success for that side: towards procuring an acquittal for the defendant his client; whether he be innocent or guilty, whether by truth or falsehood, (so the falsehood be unpunishable) are questions which make no difference; questions not worth thinking about; questions that in practice are not thought of, nor, according to current axioms, have any need or title to be thought of.

A man has committed a theft: another man, who, without a license, knowing what he has done, has assisted him in making his escape, is punished as an accomplice. But the law, (that is, the judges by whom in this behalf the law has been made,) have contrived to grant to their connections acting in the character of advocates, a license for this purpose. What the non-advocate is hanged for, the advocate is paid for, and admired.

Among the expedients that have been contrived for selling impunity to such criminals as have wherewithal to purchase it, is the invention which will be hereafter spoken of under the appellation of a decision on grounds foreign to the merits.\* To discover all grounds of this sort that can be discovered, and, as often as any such ground can be discovered, to call for a decision productive of an acquittal to the delinquent defendant, is among the functions of the counsel when enlisted in the criminal's service. Justifying, and even commending, on the part of the judge, discoveries of the same kind, is one of the most favourite of the services on which

\* Book VIII. TECHNICAL PROCEDURE.—Chap. XIV.  
Nullification.

the maxim here in question is wont to be employed. It is the duty of the judge to do that which, if he were not a judge, or a man of law in some other shape, he would be punished (and not without reason) in the character of an accomplice, for doing.

Of a rational and honest aphorism on this subject, what would be the purport and effect? That the judge ought to be counsel for all parties, and that in all sorts of causes. Not in criminal causes alone, and such criminal causes alone in which the defendant is in the condition of a prisoner,—and in those causes on the side of the defendant alone: but alike for all parties and in all sorts of causes. Where is the cause in which any the slightest departure from the rule of impartiality is, in the eye of justice and reason, anything less than criminal on the part of the judge? Not that a mere negative impartiality is sufficient: a positive, an active, impartiality must be added to it; to be equally active in his endeavours to search out the truth on both sides: that is the true impartiality, the only true and proper sort of impartiality, befitting the station of the judge.

Thus much is true, indeed; that, next to the positive and negative impartiality conjoined, comes negative impartiality alone; next to his taking equal pains to search out the truth on both sides, is his not giving himself any concern to search it out on either side.

The psychological cause of this adage, is it worth looking for? In the currency given to it, humanity, or rather childish weakness, may possibly, in here and there an instance, have had

a share; hypocrisy, selfishness covering itself in the mask of virtue, is, in every instance, a more probable cause. It is among the artifices employed by lawyercraft, to reconcile the public mind to the sale of indulgences, elsewhere spoken of. Decision in favour of the defendant on a ground foreign to the merits,—decision grounded on a quirk or quibble,—is among the instruments by which this species of traffic has ever been carried on.

In the individual instance, in which the quibble is not only applied to this purpose, but discovered, by the judge, no immediate profit perhaps results to anybody: either there is no counsel, or if there be, the counsel, without the quibble, and for the mere chance of his finding out that or some other quibble, has received his fee.

But the practice itself is, in its own nature, shocking to common sense and common honesty: the public mind, had it not been duped and gulled, could never have contemplated it without the indignation and scorn it merited. A sophism, therefore, was to be invented for that purpose: a lying spirit was to be sent forth to deceive the people: and this was the imp that offered itself.

The traffic would not have been borne in any case, if the credit of the commodity had not been kept up in all cases: and nothing could contribute more powerfully to keep up the credit of the sophism, than the distributing it through the pure (and to appearance unpaid) hands of the judge. The policy is no secret to any species of impostor: like the husbandman, he knows

when to scatter as well as how to gather in : the quack, that he may sell the more of his pills at one time, distributes them gratis at another.

Without strict search, assertion is not to be ventured : but, from principle, I should not expect to find that the adage had ever been employed to any other than a bad purpose. How should it ? Good wine needs no bush : putting a pertinent question, bringing to light the innocence of the innocent, needs no apologies, no adages.

Nothing can be more artful than the sophism ; nothing more guarded, more impregnable. Who shall contest the truth of it ? Fallacious in the highest degree, no one can say that it is false. It is like one of the two sides of a correct account : so far as it goes, it is all pure justice : stop there and sink the other side, it is the quintessence of injustice. But so sure as the account thus drawn up by lawyercraft is produced, so sure is one of the sides sunk.

The English judge, would he dare to put to a guilty defendant so much as a single question that might throw light upon his guilt ? Not he indeed. The sophism nursed up so carefully by his predecessors for the benefit of the common cause, the sophism here in question, is not of the number of those which a judge can bring forward or put aside as caprice may dictate : firm as a rock, his power would be shaken by it, were he to venture to attack it.

The policy has still deeper root : it is for this cause that cruel punishments are to be multiplied ; and in particular that the punishment of death (a punishment not good in any case) is, as opportunity serves, to be extended to all

cases. The more barbarous the punishment, the less disposed is the public mind to scrutinize into the pretences by which here and there a victim is preserved from it.

For this cause amongst so many others, the punishment of death has ever been, and (so long as lawyercraft reigns) will ever continue to be, a favourite policy with the English lawyer.

A connection, says Cicero, may be traced between all the virtues: a connection still more obvious may be traced between the several branches of injustice. Injustice to the defendant's side, injustice by excess of punishment,—and injustice to the prosecutor's side, injustice operating by quibbles,—are consanguineous vices; vices that act in partnership, and play into one another's hands.

## CHAPTER X.

OF PUBLICITY AND PRIVACY, AS APPLIED TO JUDICATURE IN GENERAL, AND TO THE COLLECTION OF THE EVIDENCE IN PARTICULAR.

### SECTION I.—*Preliminary explanations—Topics to be considered.*

CONSIDERED as applied to judicial procedure, and in particular as applied in the character of securities for the correctness and completeness of evidence,—of the mass of evidence which a judicial decision, pronounced on the question of fact, takes for its ground; publicity, privacy, and secrecy, are qualities which cannot, if considered at all, be considered otherwise than in conjunction.

Publicity and privacy are opposite and antagonizing, but mutually connected, qualities, differing from one another only in degree. Secrecy might be considered as exactly synonymous to privacy, were it not that upon the face of it it seems to exclude gradation, and to be synonymous to no other than the greatest possible degree of privacy.

For the correctness and completeness of the

mass of evidence, publicity is a security in some respects ; privacy, its opposite, in some other respects.

Publicity and privacy have for their measure the number of the persons to whom knowledge of the matters of fact in question is considered as communicated, or capable of being communicated.

The degree of actual publicity will be great or high, in the direct ratio of the number of persons to whose minds the knowledge of the matter or matters of fact in question has been communicated : the degree of privacy, in the inverse ratio of that same quantity.

The highest conceivable degree of publicity, is that according to which the matter of fact in question would be present at all times to the minds of all the inhabitants of the globe. This highest *conceivable* degree of publicity being in no individual instance ever exemplified or capable of being exemplified, is consequently greater or higher than the highest *possible* degree of publicity.

The highest conceivable degree of privacy, is that in which the number of the persons to whose minds the knowledge of the matter in question is capable of being present (so it be present to any one such mind), is the smallest number conceivable. This number is, of course, unity. But that in this or that instance there should be one person, and no more than one person, to whose mind the knowledge of the matter of fact in question has, on the occasion in question, been communicated, is a case the exemplification of which is neither impossible, nor so much as difficult.

Some matter of fact, for example, applicable in the character of circumstantial evidence to the question of fact on which a decision is to be pronounced,—suppose that by some accident it has happened to it to have presented itself to the senses of *the* judge or *a* judge by whom the decision is to be pronounced: and suppose matters so ordered, that, until the time when the decision is to be pronounced, this matter of fact has not been communicated to any other mind.

Thus it is, that, of publicity, the highest degree conceivable and the highest degree possible do not coincide: the highest degree possible falling short of the highest degree conceivable. But of privacy, the highest degree conceivable and the highest degree possible do coincide. The case in which they both have place, is that in which there is but one mind to which the knowledge of the matter in question is present, and that one mind the mind of the judge.

The highest conceivable degree of privacy, and the lowest conceivable degree of publicity, coincide: the two expressions are synonymous.

In the examination bestowed upon these opposite and antagonising qualities, it is that of publicity that must take the lead. In publicity will be seen a quality, of which, for the most part, the highest conceivable degree can do no harm; and of which a very high degree, and such a one as cannot without some attention and exertion be secured, will be subservient and conducive at least, if not indispensable, to the purposes and ends of justice.

This being the case, establishment of publicity, (and without any limits to the degree of it, but what are set by the consideration of the collateral inconveniences of delay, vexation,

and expense), will stand recommended by the general rule, as being, in most cases, conducive to the direct ends of justice: whereupon the cases in which privacy (viz. in a mode as well as degree adapted to the nature of this or that particular case) is conducive to those ends, will, with reference to that general rule, wear the character of *exceptions*.

On the present occasion, correctness and completeness of the mass of evidence are the points and objects to be provided for and secured: qualities, in relation to which, the most effectual and eligible mode of securing on each occasion the existence of them, is the problem to the solution of which it is the object and endeavour of the contents of this part of the work to contribute.

But, as the mass of evidence itself, so the correctness and completeness of that mass, is not itself an ultimate end, but a means only with reference to an ulterior end. This ulterior end is rectitude of decision: viz. on the subject of the matter in question; which, in so far as evidence is concerned, is the existence or non-existence of some matter of fact.

For what reason (it may be asked) on the present occasion bring this distinction in view?

The answer is,—For giving, on the sort of theatre in question, to rectitude of decision its best chance, it will not be altogether sufficient either that the chief instrument of security, *publicity*, or that *publicity* and *privacy* together, (each in its proper place), be applied to the mass of evidence and to that alone, (or to this or that portion of it, as the case may require): it may be necessary that these same safeguards should respectively be applied to this or that *other*

article : for example, to the declared grounds and reasons of the decision ; considered as delivered, or capable of being delivered, and rendered more or less public, by the deciding judge.

And forasmuch as, (considered with relation to the correctness and completeness of the mass of evidence), the degree of consideration necessary to be bestowed on the subservient qualities of publicity and privacy will be in no slight degree ample ; it may be advisable to give to the enquiry that degree of extension (beyond the proper subject of the present book, as announced by its title) which will be necessary to enable it to comprehend such other of the instruments and operations of procedure, as these same qualities of publicity and privacy may, according to the nature of each case, be found applicable to, with advantage.

In relation to publicity and privacy, the following are the topics that present themselves for consideration :—

I. The operations and instruments (judicial operations and judicial instruments), capable of being the subject-matter of publicity or privacy, of divulgence or concealment.

These seem reducible to the following heads, viz.

1. The mass of evidence in question : of whatsoever materials composed, viz. real or personal, which again is either testimonial or documentary.

2. The interrogatories, whereby, of what is testimonial, such part as is not spontaneously exhibited, is elicited and extracted.

3. The arguments delivered by the parties or their representatives, in the character of observations upon the evidence.

4. The interrogatories (if any) that come to have been administered by the judge.

5. The recapitulation (if any): i.e. the summing up of the mass of evidence, performed (with or without observations of his own) by the judge.

6. The decision pronounced by the judge on the question of fact: with or without reasons.

II. The different characters in which it may be of use that, by the means and instruments of publicity employed, different members of the community should receive communication of these several matters.

These characters will be found to be those of—

1. Eventual witnesses (percipient witnesses)—furnishing ulterior and supplemental testimony, in relation to the matters of fact which are the subjects of the enquiry.

2. Witnesses, who,—in the character of percipient witnesses of the testimony exhibited by the principal witnesses,—may eventually, in the character of deposing witnesses, be of use, by depositing in confirmation or disaffirmance of the correctness and completeness of the *minutes* taken of the testimony delivered by the principal witnesses.

3. Judges, who, in quality of administrators of the force of the popular or moral sanction, take eventual cognizance of the whole proceeding; for the purpose of passing a judgment of approbation or disapprobation on the conduct of the several actors in the judicial drama, viz. (parties, agents, representatives of parties, witnesses, judge or judges, subordinate judicial officers acting under the direction of the judge or judges).

4. Executioners, viz. of the judgment pro-

nounced, by themselves and colleagues, on the conduct of the several actors, as above: executioners; viz. by the bestowal of their good or ill opinion, their good or ill will, and hence upon occasion (as the substantial fruits and results of such good or bad opinion and will) their good or ill offices.

III. The mode in which, by the members of the public (as above) in their several characters (as above), communication of the matters of fact (viz. the evidence in question) is capable of being received.

This mode of reception will be determined by, and will be correspondent to, the form in which the evidence is delivered; viz. according as, in virtue of such form, it comes under the denomination of *oral* (otherwise called *vivâ voce*) testimony, or *scriptitious* evidentiary matter, already consigned to writing at the time of its being delivered.

If it be oral; to the reception of it by any person at the time of its delivery, and in the character of orally-delivered testimony, it is necessary that, at the very time, he be present at the delivery of it. If it be scriptitious; all that is either necessary or possible is, that the writing, or the contents of it, be present to his mind time enough for the performance of the function (whatever it be) which it is desirable he should perform in relation to it. If it be an article of real evidence, of the evanescent kind—it stands, in this respect, upon the footing of orally-delivered testimony: if of the permanent kind,—it stands, in this respect, upon the footing of scriptitious evidence.

IV. The means, or instruments, capable of

being applied to the purpose of giving publicity to the evidentiary matter in question : together with the several degrees of publicity capable of being given to it by those means.

Of the degree of publicity in each instance, an exact measure is afforded by the number of the persons to whose minds, on the occasion in question, in time for the purpose in question, the evidentiary matter in question is present.

In the case of testimony orally delivered and not consigned to writing, the greatest possible number of such cognizant persons, if the judicial theatre be a closed room, (as is always the case in England, and, with few or no exceptions, in modern Europe), will be determined and limited by the magnitude and structure of the room.

In the case of evidence consigned to writing, the number of such persons will be determined, in the first place, by the number of exemptions made ; in the next place, by the number of persons to the mind of whom it happens to each such exemption to be present, as above.

In both cases, the means or instruments of publicity may be distinguished into natural and factitious. Natural, are those which take place of themselves, without any act done by any person (at least by any person in authority) with the intention and for the purpose of producing or contributing to the production of this effect. Factitious, are such as, for this very purpose, are brought into existence or put in action by the hand of power.

Considered in itself, a room allotted to the reception of the evidence in question (the orally delivered evidence), is an instrument rather of

privacy than of publicity; since, if performed in the open air and in a plain, the number of persons capable of taking cognizance of it would bear no fixed limits: it would, in no individual instance, have any other limits than those which were set to it by the strength of the voice on the one part, and the strength and soundness of the auditory faculty on the other.

Considered on the other hand in respect of its capacity of being so constructed as to be in any degree an instrument of privacy,—the room in question, the place of audience, may (in so far as, in the magnitude and form given to it, the affording room and accommodation to auditors in a number not less than this or that number is taken for an end) be considered, in this negative sense, as an instrument of publicity.

If,—in the view of securing what (for the purposes in question, as above, and in the character in question, as above) is looked upon as a requisite or desirable number for the *minimum* number of the audience,—means are taken by public authority for securing attendance on the part of persons of such or such a description, in such or such a number; whether the means thus taken be of the nature of reward, or punishment, or both in one, (as is the case where attendance is made matter of duty to an official person, who receives a recompence for the performance of the duties of his office), such means are an example of the sort of means above described under the appellation of factitious means.

If, while in the act of *vivā voce* utterance, or afterwards, the purport or tenor of the evidence be committed to writing; the same means and

instruments of divulgation become applicable to it, which have place in the case of that sort of evidence which is scriptitious in its origin.

But in the case of *vivâ voce* evidence, there is a demand, not only for those means and instruments which are necessary and sufficient to any given degree of divulgation in the case of evidence which is in its origin scriptitious, but also for such antecedently employed means and instruments as are necessary to the purpose of bringing about this perpetuation. Minuting or note-taking, copying, printing, publishing,—these are so many successive operations, which, according to the degree of divulgation or publicity given or proposed to be given to the matter, become necessary in the character of means of publicity: and so many as there are of these operations performed, so many are the instruments or sets of instruments, personal and real, that come to be employed about it.

These means and instruments, (like those others that were brought to view in the case of orally-delivered evidence), considered as being thus delivered without being consigned to writing, may be distinguished from each other by the epithets of *natural* or *factitious*, according as the hand of authority is or is not employed in the giving existence or aid to them.

The place of evidence itself being, on the occasion in question, naturally, and usually, and properly, in the hands and at the command of the judge; and the several operations conducive to divulgation being (like any other operations) capable of being interdicted, not only on each particular occasion by the judge, but on

every or all occasions by the legislator;—hence, in so far as forbearance is in any instance given to the exercise of such prohibitive power, a sort of negative means of publicity comes to be, by the hand of authority, employed. Admission given, extra-accommodation given, to note takers,—permission of publication or republication at length in the way of extract or abridgment, given to the editors of newspapers, and other periodical papers,—in this way, (on the occasion in question, as on other occasions), whatsoever mischief is by the hand of authority forborne or omitted to be done, is naturally and frequently placed to the account of merit, and taken for the subject of approbation and praise.

Instruments of privacy.—In this character, two sorts of apartments, both of them fit appendages to the main theatre of justice, may be brought to view; viz:—

1. The witnesses' chamber or conservatory.
2. The judge's private chamber, or little theatre of justice.

Of the nature and destination of these two apartments, explanation will come to be given under another head.

As, when publicity is the object, the magnitude of the theatre is among the instruments employed for the attainment of it; so, when privacy is the object, the smallness, if not necessarily of the apartment itself, at any rate of the company for which it is destined, qualifies it for operating in the character of an instrument of privacy.

**SECTION II.—*Uses of publicity, as applied to the collection of the evidence, and to the, other proceedings of a court of justice.***

The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security, it operates in the first place upon the deponent; and, in a way not less important, though less immediately relevant to the present purpose, upon the judge.

1. In many cases, say rather in most (in all except those in which a witness, bent upon mendacity, can make sure of being apprised with perfect certainty of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements), the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. However sure he may think himself of not being contradicted by the deposition of any percipient witnesses; yet, if the circumstances of the case have but afforded a single such witness, the prudence or imprudence, the probity or improbity, of that one original witness, may have given birth to derivative and extra-judicial testimonies in any number. “Environed, as he sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues; many a known face, and every unknown one, presents to him a possible source of detection, from whence the truth he is struggling to sup-

press, may, through some unsuspected channel, burst forth to his confusion.”\*

2. In case of registration and recordation of the evidence, publicity serves as a security for the correctness in every respect (completeness included) of the work of the registrator.

In case of material incorrectness, whether by design or inadvertence,—so many auditors present, so many individuals, any or each of whom may eventually be capable of indicating, in the character of a witness, the existence of the error, and the tenor (or at least the purport) of the alteration requisite for the correction of it.

3. Nor is this principle either less efficient or less indispensable, in the character of a security against misdecision considered as liable to be produced by misconduct in any shape on the part of the judge. Upon his moral faculties it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual faculties it acts as a spur, urging him to that habit of unremitting exertion, without which his attention can never be kept up to the pitch of his duty. Without any addition to the mass of delay, vexation, and expense, it keeps the judge himself, while trying, under trial. Under the auspices of publicity, the original cause in the court of law, and the appeal to the court of public opinion, are going on at the same time. So many bystanders as an unrighteous judge (or rather a judge who would otherwise have been unrighteous) beholds attending in his court, so many witnesses he sees of his unrighteousness; so

\* Bentham's Plan of a Judicial Establishment, p. 26.

many ready executioners, so many industrious proclaimers, of his sentence.

On the other hand; suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.\*

4. Publicity is farther useful, as a security for the reputation of the judge (if blameless) against the imputation of having misconceived, or, as if on pretence of misconception, falsified, the evidence. Withhold this safeguard, the reputation of the judge remains a perpetual prey to calumny, without the possibility of defence: apply this safeguard, adding it as an accompaniment and corroborative to the security afforded (as above) by registration,—all such calumny being rendered hopeless, it

\* The constitution of the judicial establishment, including the question as between unity and multiplicity in regard to the number of the judges sitting and acting at the same time, belongs not to the present work. Meantime, as well with regard to division as with regard to subordination of judicial powers, let it be noted, that it operates no otherwise as a guard to probity, than in as far as the chance of disagreement and altercation presents a faint chance of occasional publicity.

will in scarce any instance be attempted ; it will not in any instance be attempted with success.

5. Another advantage (collateral indeed to the present object, yet too extensively important to be passed over without notice) is, that, by publicity, the temple of justice adds to its other functions that of a school : a school of the highest order, where the most important branches of morality are enforced by the most impressive means : a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice. Without effort on their own parts, without effort and without merit on the part of their respective governments, they learn the chief part of what little they are permitted to learn (for the obligation of physical impossibility is still more irresistible than that of legal prohibition), of the state of the laws on which their fate depends.

Uses of leaving it free to all persons, without restriction, to take notes of the evidence.

1. To give effect, in the way of permanence, to the general principle of publicity—to the general liberty of attendance, proposed to be allowed, as above. From no person's attendance in the character of auditor and spectator, can any utility be derived, either to himself or to any other individual, or to the public at large, but in proportion as his conceptions of what passes continue correct : and by no other means

can he make so sure of their correctness as by committing them (or at least having it in his power to commit them) to writing, with his own hand, at the very time.

But for this general liberty, there would be no effectual, no sufficient check at least, against even wilful misrepresentation on the part of an unrighteous judge. Against written testimony from such a quarter, what representation could be expected to prevail, on the part of individuals precluded by the supposition from committing to writing what they were hearing; precluded from giving to their testimony that permanence on which its trustworthiness would so effectually depend?

2. To afford a source of casual solution or correction to any casual ambiguity, obscurity or undesigned error, in the representation given of the evidence by the judge or other officialscribe.\*

Rule. Allow to persons in general the liberty of publishing, and that in print, minutes taken by anybody of the depositions of witnesses, as above.

Reason. Without the liberty of publishing,

\* The security thus afforded against misrepresentation (wilful or not wilful) on the part of the judge, may be apt to present itself as belonging in strictness to the subject of procedure at large, or to that of the organization of the judicial establishment, and not to that branch of the subject of procedure which is the subject of the present work—the branch particularly relative to the topic of *evidence*. But as the quality of trustworthiness in a lot of evidence is no otherwise valuable than as a *means* to an *end*—and rectitude of decision is that end; when the reasons of a rule directed to a subordinate object come to be assigned, the reasons which indicate on the part of the *same* rule a still higher and more important utility, viz. its immediate subservience to the ultimate end, can scarcely be out of place.

and in this effectual manner, the liberty of penning such minutes would be of little use. It is only in so far as they are made public, that they can minister to any of the above mentioned uses (except that which consists in the information they afford to the judge). By a limited circulation, room is left for misrepresentation, wilful as well as undesigned: by an unlimited circulation, both are silenced: by the facility given to an unlimited circulation, both are prevented.

Look over the list of advantages by which the demand for publicity is produced in respect of the *evidence*; you will find them applying (the greater part of them, and with a force quite sufficient) to the extension of the demand to all *observations* of which the evidence is the subject; whether on the part of the judge, or of the parties, or their advocates. Security to suitors (to the suitors in each individual cause)—and through them to men in general in the character of persons liable to become suitors,—against negligence and partiality on the part of the judge: security to the judge against the unmerited imputation of any such breach of duty: instruction to the people at large, in the character of occasional spectators and auditors at the theatre of justice, and occasional readers of the dramatical performances exhibited at that theatre.

The evidence itself is so and so: from this evidence, the decision which the judge proposes to ground on it, and the conclusion necessary to warrant that decision, are so and so: this conclusion, is it a just and proper deduction from the evidence? In some instances the con-

clusion may follow so plainly and inevitably from the evidence, that any words which should be expended in displaying the propriety of it would be thrown away: while, in other cases, the conclusion (though clear enough to him who with full time before him shall take upon himself to bestow upon the subject an impartial and attentive consideration) may yet present itself to the hearers under such a veil of obscurity, as may well require explanations on the part of the judge, to satisfy them that he has not availed himself of the obscurity to any such sinister purpose as that of pronouncing a decision not warranted by the truth of the case.

If, previously to the decision for the purpose of which the enquiry is performed, debate should arise, with arguments on both sides; in such a case, under the auspices of publicity, a result altogether natural (whether obligatory or no) is, that the judge should state, in the presence of the by-standers (his inspectors), the considerations—the reasons—by the force of which the decision so pronounced by him has been made to assume its actual shape, in preference to any other that may have been contended for. In such a situation, that to any judge the good opinion of such his judges should be altogether a matter of indifference, is not to be imagined. In such a state of things, that which the judge is to the parties or their advocates, the by-standers are to the judge: that which arguments are in their mouths, reasons are in his.

Publicity therefore draws with it, on the part of the judge, as a consequence if not altogether necessary (since in conception at least it is not inseparable) at any rate natural and

in experience customary, and at any rate altogether desirable,—the habit of giving reasons from the bench.

The same considerations which prescribe the giving an obligatory force to the one arrangement, apply in like manner to the other: subject only in both instances to the exception dictated by a regard to preponderant inconvenience, in the shape of delay, vexation, and expense. Whenever the reason of the arrangement made by the judge is apparent upon the face of it, entering into a detailed explanation of it would be so much time and labour lost to everybody.

So difficult to settle is the proportion between the advantage in respect of security against misdecision on the one hand, and the disadvantage in respect of delay and vexation on the other, that the practice of giving reasons from the bench can scarcely be made the subject of any determinate rule acting with the force of legal obligation on the judge. Of courts of justice it may be said that they shall be open, unless in such and such cases: while, in the description of these cases, a considerable degree of particularity may be employed, designative of the species of cause, or of the stage at which the cause (be it what it may) is arrived in the track of procedure. But of the judge it cannot be determined with any degree of precision, in what cases he shall, and in what cases he shall not, be bound to deliver reasons.

This, however, is but one out of the multitude of instances, in which, though an obligation of the legal kind is inapplicable, an obligation of the moral kind will be neither inapplicable nor

ineffacious. Specifying reasons is an operation, to the performance of which, under the auspices of publicity, the nature of his situation will (as already observed) naturally dispose him to have recourse. Consigned to the text of the law, an intimation to the same effect, in terms however general, can scarce fail of producing upon the minds of the persons concerned, the effect on this occasion to be desired: in the minds of the public, a more constant disposition to expect this sort of satisfaction from the mouth of the judge; in the mind of the judge, a more constant disposition to afford it.

In legislation, in judicature, in every line of human action in which the agent is or ought to be accountable to the public or any part of it,—giving reasons is, in relation to rectitude of conduct, a test, a standard, a security, a source of interpretation. Good *laws* are such laws for which good reasons can be given: good *decisions* are such decisions for which good reasons can be given. On the part of a legislator whose wish is that his laws be good, who thinks they are good, and who knows why he thinks so, a natural object of anxiety will be, the communicating the like persuasion to those whom he wishes to see conforming themselves to those rules. On the part of a judge whose wish it is that his decisions be good, who thinks them so, and knows why he thinks them so, (it is only in proportion as he knows why he thinks them good that they are likely so to be,) an equally natural object of anxiety will be the communicating the like persuasion to all to whose cognizance it may happen to them to present themselves; and more especially to those from whom

a more immediate conformity to them is expected. •

In neither case, therefore, does a man exempt himself from a function so strongly recommended as well by probity as by prudence; unless it be where—power standing in the place of reason—the deficiency of psychological power being supplied by political, of internal by external,—he exempts himself, because it is in his power to exempt himself, from that sort of qualification, which, feeling himself unable to perform well, he feels it at the same time in his power to decline performing.

Oughton, in his Treatise on the Practice of the Ecclesiastical Courts, maintains, without reserve, that the practice of examining witnesses in public is a bad practice.

In support of this censure he adduces two reasons:—

1. The witnesses, in this case, have the faculty of entering into a confederacy, and of fashioning their stories in such manner as to preserve them from inconsistency.

True; this faculty they possess where the examination is performed in public: but this same faculty, is it less open to them where it is performed in secret?

The danger peculiar to the system of publicity, is confined to the short space of time during which, if the requisite and not impracticable precaution be not taken, a mendacious witness about to depose may profit by hearing the deposition, as it issues, of a preceding witness, depositing in evidence to the same fact.

This danger, as it is frequently worth obviating, so neither is it incapable of being ob-

viated: and this (as will be seen) it may be, without depriving the process of the benefit of publicity.

The observation of Oughton is confined to the case of mutual concert. But the advantage derivable by a mendacious witness from the knowledge of the purport of the anterior deposition of another witness, does not require any such complicity on the part of such other witness. It is equally derivable from the testimony of an adverse, as from that of a friendly, witness.

2. Fear of the resentment of one or other of the parties might operate upon the witness, so as to produce in his testimony a departure from the truth. It might occasion him to keep locked up in his breast some fact, which, if disclosed, might operate to the prejudice of the party by whom his testimony was called for, or of the opposite party.

To this objection the following observations seem applicable.

1. In a cause between individual and individual, whatever interest one party has in the witness's speaking false, the opposing party has a correspondent interest in causing him to speak true.

2. The disposition of the witness, even if left to himself, might be, on this or that point, to speak false: at the same time that, for confining him within the pale of truth, there is no other chance than that power of contradiction and refutation, which depends upon a mass of information which the party in question, and he only, is in possession of.

3. The secrecy in question is but temporary. Upon this as upon the other system, when the cause comes to be heard, the depositions.

are divulged. Whatever is contained in the deposition, of a nature displeasing to either party, the invoker or the adversary, is then disclosed.

True it is that this applies only to actual deposition : it does not apply to silence. By the apprehension of the displeasure of one of the parties, it may happen that by the witness something should be suppressed, which, had it not been for such presence, might have come out. But this inconvenience is too slight to be put for one moment in comparison with the transcendent benefits of publicity. It can never afford ground for anything more than an occasional exception.

By the admirers of the technical system, as it exists in England, the bar has been spoken of as constituting the best, if not the only necessary, public ; as a most excellent and efficient check upon the bench.

Thus far may be admitted : that, in the character in question (viz. that of uncommissioned inspecting judges), so far as either practical experience or technical science are concerned, no other persons, in equal number, can come up to them : that they are scarce ever altogether wanting, and that upon the whole, the number of them bears (as it were to be wished it should do) a proportion to the importance of the cause.

Thus stands the matter under the technical system. But were any one to say that under the natural system this check would be wanting, and that therefore, under the natural system, there would be no sufficient security for good judicature, in such a case its title to the character of an indispensable security would require a more particular scrutiny.

1. So long as the technical system were the object to be pursued; to the conduct of a set of judges acting under that system, no other adequate inspectors could be found than a set of persons alike impregnated with technical science. Remove those features and arrangements, which, being peculiar to the technical system, are repugnant to common sense as well as common honesty,—and unlearned inspectors might be nearly as competent to that function, as those learned ones are at present.

2. Of the incongruities, absolute or relative, into which the judge is liable to fall, it is with reference to those only which are such in relation to the technical system as it actually stands at present, that the eyes of those technical inspectors can afford any security. So far indeed as the technical system has for its ends in view the ends of justice, so far the inspection exercised by these watchmen might serve, and does serve, to confine the course of judicature within the proper track of justice. But in proportion as these only legitimate ends have been neglected or contravened, in so far that same system of inspection, instead of being subservient, is adverse, to the ends of justice. Wherever misdecision has for its source either the sinister interests that gave birth, or the prejudices that have given support, to the technical system; far from operating as a check to misdecision, the presence of these technical inspectors will operate as a security in favour of it. In how many instances does the technical system not only authorize, but prescribe, and that professedly and avowedly, decisions contrary to the merits, on grounds foreign to

the merits? What, in these cases, will be the effect of a system of inspection administered by such inspectors? Not to diminish the frequency of such injustice, but to give it security and increase.

The faculty of appeal may be apt to present itself as an effectual succedaneum to publicity in judicature. In many countries,—under the Rome-sprung system in general—under Anglican law in some instances, it is the actual, and in some, the only one.

The utility of appeal in general—its efficacy in regard to the particular points here in question,—will depend in no small degree upon the arrangements made in relation to that branch of procedure; a detail which belongs not to this work.

But, that the faculty of appeal, however conducted, cannot operate in any such way as to supersede the demand for publicity in the collection of testimony, may even in this place be made sufficiently evident by various considerations.

1. Appeal, howsoever conducted, is clogged by an unavoidable mass of delay, vexation and expence. Publicity is in no case productive of considerable delay; and, so far as concerns open doors,—in a word, as to everything but the official registration of the evidence, when that operation is thought fit to be prescribed (concerning which, see further on)—is altogether unattended with expence.

2. In the case of appeal, as generally established, the evidence, as registered, is the very basis on which the appeal, so far as concerns the question of fact, is made to stand. But of

the instruments to which the tenor or purport of the testimony is professed to be consigned, the correctness is taken for granted, and not suffered to be disputed. Appeal, therefore, in this point of view, howsoever it may be an auxiliary, is no succedaneum to publicity. Is publicity necessary to secure the correctness of the registration for the purpose of the immediate decision?—then so is it for the purpose of the appeal. Appeal, instead of rendering it unnecessary, increases the demand for it.

If grounded on the same evidence, it affords no sort of security against incorrectness or incompleteness, whether from mendacity, bias, or blameless misconception or omission, on the part of the evidence. In all points, the correctness of the evidence is taken for granted.

4. Punishment or disapprobation experienced or apprehended from the judge above, in virtue of the appeal, operates, even without publicity, as a check and remedy more or less effective, against misconduct (whether through mental weakness, improbity, or negligence) in the judge below. But the judge above, where is the check upon misconduct on his part in any shape? What possible check so effectual as publicity? and if the court above is at the highest stage, what other possible check is afforded by the nature of things?

5. Publicity, a principle of the most simple texture, is so much the less liable to be out of order: nor is it in the power of mismanagement to do much towards the destruction of its efficacy. Of the principle of appeal, the utility depends altogether upon the details: upon the

propriety of the arrangements taken in relation to it : among which this of publicity is one of the most natural.

" Appeals without publicity, are an aggravation, rather than a remedy: they serve but to lengthen the succession, the dull and useless compound, of despotism, procrastination, precipitation, caprice and negligence."

**SECTION III.—*Of the exceptions to the principle of universal publicity.***

The uses and advantages of publicity have already been brought to view: so far as those uses are concerned, the most complete and unbounded degree of publicity cannot be too great.

But in other ways, in particular cases, publicity, if carried to this or that degree, may on this or that score be productive of inconvenience, and the mass of that inconvenience preponderant over the mass of the advantages. To the application of the principle of publicity —of universal and absolute publicity,—these cases will present so many exceptions.

Let us observe what these cases are: observe, in regard to each, what the circumstance is, by which the demand for the degree of privacy in question is presented: appreciating in each instance, as near as may be, the proportion as between inconvenience and advantage.

1. Publicity is necessary to good judicature. True. But it is not necessary that every man should be present at every cause; and at every hearing of every cause. No:—nor so much as

that every man should be so present, to whom, for whatever reason, it might happen to be desirous of being present.

A man, a number of men, wish to be present at the hearing of a certain cause; and in what view? to disturb the proceedings: to expel or intimidate the parties, the witnesses, (or what is worse and more natural, this or that party, this or that witness) or the judge. Because judicature ought to be public, does it follow that this ought to be suffered?

2. Publicity is necessary to good judicature. True: but even to him to whose cognizance it is fit that a cause, and such or such a hearing in the cause, should come, it is not absolutely necessary that he should be actually present at the hearing, and that during the whole of the time. Nor, again, is it necessary that any one person should be present, over and above those whose presence is necessary and sufficient to ensure the rendering, upon occasion, to the public, at a subsequent time, a correct and complete account of whatever passed at that time.

3. What is more; suppose a cause absolutely devoid of interest to all persons but the parties to the cause, and those parties agreeing in their desire that the doors shall be open to no other person, or no other than such and such persons as they can mutually agree upon: in this case where can be the harm of the degree of privacy thus required? As to unlimited publicity, the existence of the inconvenience that would result from it is sufficiently established by the suffrage of those who by the supposition are the only competent judges.

If the guarding the parties against injustice in the individual cause before the court, were the only reason pleading in favour of unrestrained publicity; this reason would cease in every case in which, unrestrained publicity being the general rule, all the parties interested joined in an application for privacy; or in which, privacy being the general rule, no application were made by either of them for publicity. For by common consent they might put an end to the proceedings altogether; and where no proceedings existed there would be none to make public.

But neither by any such joint application nor by any such joint acquiescence, would more than a part (and that scarcely a principal part) of the demand for publicity, unrestrained publicity, be removed. 1. In the character of so many schools of morality, the courts of judicature would, by every such exception, lose more or less of their practice and their influence. 2. What is much more natural, the habit and sense of responsibility would be proportionably weakened on the part of the judge. 3. If privacy were the general rule, both the above inconveniences would receive a great increase: and in other respects this arrangement, as compared with the opposite one, (publicity, subject to exception if on special application,) would be highly unfavourable to the ends of justice. The main use of publicity being to serve as a check upon the judge; no particular application could be made for it without manifesting a suspicion to his disadvantage: much therefore as a party might conceive himself to

stand in need of this security, he would have no means of obtaining it without exposing himself to the displeasure of the judge.

4. The supposition is, that all parties who have any interest in this question (at any rate any special interest) join in the consent given to the privacy. But this supposition is very apt to prove erroneous: nor will it perhaps be easy to pitch upon any individual case in which there can be any very perfect assurance of its being verified. More interests, it will frequently happen, are involved in a cause, than those of the individuals who appear in the character of parties to the cause.

At any rate this case has been exemplified, as often as evidence, delivered in a cause between two parties, has come to be relevant in a cause having any other party or parties. True it is, that, by compromising the suit in question, or compromising their difference before the commencement of any suit, they equally had it in their power to withhold from all third persons the benefit of all such evidence as would otherwise have been called into existence by that suit: but true it also is, that, on the occasion of the delivery of the evidence, each party, whether he prejudiced his own interest or no, might prejudice the interest of such third persons, not being parties to the suit.

In consenting to the privacy, either party, or even each of them, may, in one way or other, have done prejudice to his interest: in this case, the public, and perhaps individual third persons, will have participated in the inconvenience resulting from such imprudence.

The cases which present themselves as creating a demand for a certain degree of restriction to be put upon the principle of absolute publicity, each for an appropriate mode and degree,—these cases, as expressed by the several grounds of the demand, may be thus enumerated.

*Object 1.* To preserve the peace and good order of the proceedings: to protect the judge, the parties, and all other persons present, against annoyance.

*Object 2.* To prevent the receipt of mendacity-serving information.

*Object 3.* To prevent the receipt of information subservient to the evasion of justiciability in respect of person or property.

*Object 4.* To preserve the tranquillity and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasinesses or disagreements among themselves.

*Object 5.* To preserve individuals and families from unnecessary vexation, producible by the unnecessary disclosure of their pecuniary circumstances.

*Object 6.* To preserve public decency from violation.

*Object 7.* To preserve the secrets of state from disclosure.

*Object 8.* So far as concerns the taking of active measures for publication,—the avoidance of the expence necessary to the purchase of that security, where the inconvenience of the expense is preponderant (as in all but here and there a particular case it will be) over the ad-

vantage referable to the direct ends of justice. This case will be considered in another book.\*

*Object 9.* (A false object.) To prevent the receipt of information tending to produce undue additions to the aggregate mass of evidence.

Purpose 2. Securing the persons of the judge and the other *dramatis personæ* against violence and annoyance.

The importance of this object, the necessity of making due provision for it, is too obvious to be susceptible either of contestation or proof. Being thus incontestable, the necessity is the more apt to be converted into a plea for abusive application, for undue extension.

Suppose the judge destitute of all controuling power, the place of audience being alike open to all comers : the whole quantity of room might be engrossed at any time by a host of conspirators coming together for the express purpose of intimidating the judge and causing injustice to be done.

What seems necessary to this purpose is, therefore, that, of the whole number of seats or stations contained in the judicatory, a certain number should, upon a declaration made by him of the presumed necessity, be at any time at his command, to be filled by persons nominated by himself and armed in such manner as he thinks fit ; all other persons being precluded from bringing arms of any kind.

But to enable a man to contribute his physical force to the preservation of the peace, in a room or apartment of this kind, it is not neces-

\* Book III. EXTRACTION. Chapter 6. *Notation and Recordation.*

sary that the place occupied by him should be among those which are most effectually adapted to the purpose of enabling a man to comprehend distinctly the conversations that have place there. The stations allotted to these eventual guards to the person of the judge, should therefore be such as to leave free to promiscuous visitants such as are best adapted to the purposes of sight and hearing.

On such occasion, to warrant the assumption of this power, it should be necessary for the judge to declare his opinion of the needfulness of such a precaution: the declaration to this purpose being notified by a placard signed by the judge, and hung out in a conspicuous situation on the outside of the court.

But for this precaution, a natural result would be his taking to himself, as his own property, such part of the judicatory as were allotted to him in trust for that purpose, and in some way or other disposing of it to his own profit.

Doors open to persons of all classes without distinction: but any one whose presence would, by disease, or filth, or turbulence, be a nuisance to the rest, individually and on that account excludible.

Nor is pay, exacted for places of superior convenience, inconsistent with the spirit of the principle: not in the theatre of justice, any more than in any other theatre. The more elevated the spectator's condition in life, the better his qualification to act in the character of guardian to the probity of the judge. But a man bred up in the delicacy of the drawing-room, will not willingly frequent any place in which he is liable to be elbowed and oppressed

by men whose labours, how much soever more profitable to the community than his indolence, have just been employed in the foundry or in the slaughter-house. For purposes of this sort, rate of payment is perhaps the only practicable principle of selection ; at any rate, the least invidious possible.

Purpose 2. Prevention of mendacity-serving information.

Wheresoever, on the part of a deposing witness (party or not party to the cause), there exists a propensity to mendacity ; the probability of preventing his giving way to that disposition, or (in the event of his giving way to it) of preventing his dishonest endeavours from being productive of their intended effect,—depends in no small degree upon the measures taken for preventing him from obtaining, in time to avail himself of it, information concerning the testimony delivered or about to be delivered by this or that other person in relation to the same matter. The co-witness, is he on the same side with the supposed mendaciously-disposed witness ?—the purpose for which he needs to be apprized of such testimony, is the giving to it what confirmation may be in his power, and the avoiding to contradict it. The co-witness is he on the opposite side ?—the use then is, that he may be enabled either to overpower it, or to avoid being overpowered by it, according to the probable degree of its probative force. By the nature of the case, or the mass of accordant evidence, does it appear too strong to be overborne ? In this case, for fear of being overborne and discredited by it, he avoids, as much as may be, from touching on the main points : as,

in the opposite case, he touches upon those same points with care and preference.

To a propensity, at the same time so unavoidably prevalent, and so pernicious to truth and justice, every obstacle ought of course to be opposed, that can be opposed.

When (as in the Roman school) the mode of examination is private in the highest degree, or in a degree near to the highest; this purpose is in a great measure effected of course, with or without thinking of it. The testimony delivered by a witness not being known, but either to the judge himself, or to some other person or persons on whom it is supposed that (whether *equal* or no) at least *sufficient* dependence may be placed; his testimony, or such part of it as the judge thinks fit, is committed to writing,—and thereupon (until the time comes for hearing arguments, and pronouncing a decision grounded on it) remains wrapt up in darkness.

There remains, in the character of a means of divulgation, the discourse—the extra-judicial discourse—of the examinee himself. Against this source of mendacity-serving information, if the process of examination is not finished at the first meeting, there exists no remedy: unless his case be that of a person in whose instance immediate commitment to safe custody is for this or other purposes regarded as warrantable.

On the other hand; if the case be such as is understood to warrant such commitment, accompanied with the seclusion of the person, for the time requisite for this purpose, from promiscuous intercourse (personal as well as epistolary);

in that case, this source of mendacity-serving information is sealed up of course.

Even when the mode of examination is public, and no such power of commitment has place, still, so long as the examination is begun and concluded at the same meeting, the nature of the case does not refuse a remedy. The persons about to be examined being predetermined, and foreknown at the time appointed for the examination, they repair to one and the same room, (a room allotted to the purpose); in which, under the custody of an officer appointed to prevent conversation, they remain together, each person not being suffered to quit the room till called for to undergo his examination: which performed, he is permitted to go at large, but not permitted to return to the room and company from which he came.

In cases where a second examination of a witness is expected to be necessary, with a view to confrontation or subsequent sifting, he is reconducted out of court, to prevent his hearing the information communicated by any other witness, and kept in the place of safe custody in which he was before, till again called.

To give to the system of precautions demanded for this purpose, the utmost degree of efficiency of which the nature of things allows them to be susceptible,—to determine on this occasion what shall be the fittest decision, between the antagonizing claims of the direct ends of justice on the one hand, and the collateral ends of justice on the other,—belongs not so much to this subject as to that of procedure at large.

The reason why it was necessary that mention should be in this place made of it, is, that, whenever such seclusion has place, a correspondent degree of relative privacy necessarily has place. During the time he is thus kept in the witness's waiting room, each such *paolo-post-future* examinee remains precluded from the faculty of rendering himself a member of the assemblage of persons of whom the audience is composed.\*

Purpose 3. Prevention of disclosures, subse-

\* The misfortune is, that, besides the expense of whatever architectural arrangements may be necessary to give full effect to the principle of separation thus applied, a considerable measure of delay will be found unavoidably attached to the employing of this security. After the plaintiff (for example) has told his story out of the hearing of the defendant, the defendant has to tell his, and to tell it out of the hearing of the plaintiff. Thus far, all is smooth and easy. But, for the purpose of sufficient security, the defendant must have the faculty of putting questions to the plaintiff, in order to draw from him, in explanation, completion, and perhaps refutation, of allegations or depositions, such parts of his case as he might otherwise have suppressed. Moreover, to obtain any explanation of the testimony which the plaintiff has been delivering, it is necessary that he should be correctly apprized of the purport, or rather the very tenor, of the testimony. But, at the time when it was delivered, the defendant was, for the other purpose, studiously excluded. This being the case, of two things one: either, after having delivered his testimony out of the hearing of the defendant, the plaintiff must, for the purpose of the scrutiny, deliver it over again in the hearing of the defendant; or, minutes having been taken of his deposition on the first occasion, those minutes must on the second occasion be read, to serve as a ground for the questions which the defendant is to have the liberty to put to him: —and so, vice versa, for the purpose of the cross-examination to be performed by the plaintiff on the defendant. But to this arrangement, it is evident, no inconsiderable quantity of delay will be attached; and since, if this order of proceeding be invariably observed in all suits,

in that case, this source of mendacity-serving information is sealed up of course.

Even when the mode of examination is public, and no such power of commitment has place, still, so long as the examination is begun and concluded at the same meeting, the nature of the case does not refuse a remedy. The persons about to be examined being predetermined, and foreknown at the time appointed for the examination, they repair to one and the same room, (a room allotted to the purpose); in which, under the custody of an officer appointed to prevent conversation, they remain together, each person not being suffered to quit the room till called for to undergo his examination: which performed, he is permitted to go at large, but not permitted to return to the room and company from which he came.

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To give to the system of precautions demanded for this purpose, the utmost degree of efficiency of which the nature of things allows them to be susceptible,—to determine on this occasion what shall be the fittest decision, between the antagonizing claims of the direct ends of justice on the one hand, and the collateral ends of justice on the other,—belongs not so much to this subject as to that of procedure at large.

all things and persons whose presence is necessary thereto in the character of sources of evidence. The *efficiency* of the decision depends upon the complete forthcomingness of all things and persons, which, for the purpose of justiciability, it is necessary should be at the disposal of the judicatory.

There exists not that sort of cause, in which, to this or that party, on one or other side of the cause (but more especially on the defendant's side), it may not happen to have an interest in preventing the forthcomingness either of persons or things, to one or other, or both, of the judicial purposes just mentioned.

There exists not that species of cause, in which it is not the interest of each party that every witness, whose testimony would, if delivered, operate to his disadvantage, should be prevented from delivering it. Nor is this interest, necessarily, and in all cases, (though naturally and in most cases it will be,) a sinister one. For, in the instance of any given witness, suppose his testimony about to be false, and, at the same time, likely to gain credence. Though, on account of the impossibility of establishing to any legal purpose the existence of both these facts, it could never be right for the law itself to lend its assistance to any such evasion, nor so much as to leave the attempt disipnishable; yet in a moral point of view, supposing the expectation of the eventual union of the two disastrous incidents sincere, and to a certain degree intense, it would not be easy (it should seem) to find in it a just ground of censure.

As little exists there that species of cause,

in or on occasion of which it may not happen to this or that party on either side (more particularly on the defendant's side) to be, by decision of the judge (direct or incidental), subjected to some obligation, which, for the fulfilment of it, requires the forthcomingness of this or that person or this or that thing or aggregate mass of things, to the purpose of his or its being at the disposal of the judicatory : some obligation, the fulfilment of which, as being attended with evil in some shape or other to the party on whom it should be imposed, it will be his interest (and thence naturally his inclination) to escape from.

It is evident that all information, calculated to assist either of the parties in removing out of the way either sources of evidence, or any thing else which for purposes of justiciability ought to be forthcoming, should (if practicable without preponderant disadvantage) be withheld. The demand for privacy on this account is chiefly confined to investigatorial procedure : when the case is ripe for being brought to trial, it will in general be practicable to take other securities against the frustration of the ends of justice in this way. Discretionary power ought therefore to be vested in the judge, to give temporary privacy to the preliminary examinations taken in the course of investigatorial procedure. Their subsequent publication would in general be a sufficient security against the exercise of this power for any but proper purposes, or on any but proper occasions.

Purpose 4. Preservation of pecuniary reputation.

The demand for the application of the prin-

ple of secrecy to this purpose, is of great extent and variety.

In almost every court of justice, in almost every day's practice, cases present themselves in which, without a correct acquaintance with the pecuniary faculties of one or both parties, nothing that deserves the name of justice can be done.

On the other hand, neither are cases much less frequent, in which a public disclosure of those circumstances would, on whichever side it fell, be productive of inconvenience, preponderating in some cases over every advantage derivable from such knowledge.

1. For the purpose of punishment, a necessary point of knowledge is the pecuniary ability of the one party, the delinquent.

2. For the purpose of satisfaction, the finances of two parties (the delinquent and the party injured) are included in the demand for knowledge.

3. Let the suit be one in which costs are incurred. Not to speak of any such enormous and undiscriminating and oppressive load of factitious costs, as that which, under judge-made law, has, by the power and to the profit of judges and their confederates, been created and preserved;\* there are few causes individually taken, and no sort of cause specifically taken, in which costs, necessary and unavoidable costs, have not place. Of these, at the conclusion of the cause or causes, some disposition cannot but be made. Nor can that disposition be conformable to utility and justice,

\* See "Scotch Reform," Letter I.

unless, for the prodigious disproportion which may happen to have place between the pecuniary circumstances of one party and the pecuniary circumstances of another party, some eventual provision be made, and thereupon some account be rendered liable to be taken.

4. Knowledge of the circumstances of the debtor is necessary to the judge, to enable him to do justice as between him and his creditors: whether on a criminal, or on a non-criminal score.

5. In case of danger to ultimate solvency; knowledge of the time or times, mode or modes, to which, without ultimate, or at least without preponderant, prejudice to the creditor, the payment may be adjusted,—may be necessary to the judge, to enable him to preserve the defendant debtor from unnecessary ruin.

6. In addition to the knowledge of the aggregate amount of his debts,—knowledge of the circumstances of the creditors to whom they are respectively due, may be necessary to the judge, to enable him to preserve from unequal and unreasonable loss, third persons, not parties to the suit by which the demand for the inquiry has been produced.

To an English lawyer, considerations such as the above will scarce appear worthy of a thought. In his hands, the knots in question (like so many others) are cut, as with a sword, by a magnanimous contempt for all such niceties. It is by such magnanimity that the coffers of English judges are gorged with the accumulated pittances of the distressed; the promiscuous spoils of creditors and debtors.

It is only by the examination of the party, the *viva voce* examination, that his pecuniary circumstances can in general be established with any approach to accuracy. But (especially if performed in time) this operation would, in nine cases out of ten, or nineteen out of twenty, dry up the source of profitable misery. Hence it is that the presence of the creditors is accordingly not less intolerable to the eye of the insolvent debtor, than that of creditor and debtor is to the English judge. In cases to a vast extent, the ear of the judge is inexorably shut to all evidence respecting the pecuniary circumstances of parties. On what occasion is any such disposition manifested, as that of adjusting time and mode of payment to ability? On what occasion is any regard paid to the interests of co-creditors, who, unsuspecting of the danger, are not parties to the suit? What steam-engine is there, that, beating upon a mass of iron, would pay less regard than is paid by an English judge, with his *capias* or his *fieri facias*, to all such trifles?

On these points, is his ear open to anything in the shape of evidence? It is open to inference; open to the very worst that can be found, to the exclusion of this best, evidence: open to what, in the character of a witness, a third person (perhaps a stranger) shall suppose in relation to the party's circumstances: open to what the party himself shall think fit to say of them, delivering his testimony without the possibility of being questioned,—delivering it in the shape of affidavit evidence.

Purpose 5. Fifth purpose of privacy. Pre-

vention of needless violation to the reputation of individuals and the peace of families.

On the occasion of those disputes which are liable to have place between individuals, instances are frequent, in which, either no such blame as deserves punishment has place on any side, or none but such, for the repression of which, the quantity of suffering (in the shape of expense, and other shapes) unavoidably attached to the process of litigation, is of itself sufficient: much more if any part of that vast load of factitious vexation be added to it, which is so much in use to be added to it.

At the same time, in many a cause of this kind, such is the quantity of suffering produced on the part of this or that party, or perhaps all the parties, by the mere exposure of such incidents as have happened to have place in the course of the dispute, (in particular of the conduct maintained by them in the course of the dispute,) that, in comparison of the suffering thus unintentionally produced, any suffering that by any express act of the judge would on the occasion in question be intentionally produced, would be to any degree inferior in its amount.\*

\* This is more particularly true in the case of disputes in which the disputants are nearly related to one another: more especially between husband and wife, parent and child.

Under the ante-revolutionary constitution of France, when the institution of *lettres de cachet* was attacked on the ground of abuse, their subservience to the purpose of secrecy was brought to view in the way of justification or extenuation, and placed to the account of use. The persons thus consigned to imprisonment were persons of distinction, members of high families, who, had they not been taken care

In so far as (without prejudice to the interest of the community in general in respect of the direct ends of justice, and of that sense of security which depends upon the persuasion entertained of their being faithfully pursued) any such suffering can be prevented from taking place; the general happiness of the community will (it is evident) receive proportionable increase.

Vexation, whether to individuals or to the public, is brought to view under the head of Exclusion,\* as a ground on which the door may

of by a sort of extraordinary justice, would, under the dispensations of ordinary justice, have experienced a severer fate. Good in so far as it served to palliate the mischief of the institution, the plea was bad, in so far as it served to reconcile men to the continuance of it.

Before the accession of Louis XVI, the power of confining any number of persons for any length of time, for any cause or for none, was committed to single hands: and blank *lettres de cachet* were, it is said, an object of sale.

At the accession of that weak but well-intentioned monarch, the evil was rendered more tolerable, and thence, had anything endured, more durable. A court consisting of judges was established for the management of this business: a set of men who, setting out (as may naturally be supposed) with dispositions prone to philanthropy, would as naturally in the cavern of mystery have gradually worn them out, and put on the character of theolo-go-inquisitorial despotism in their stead. Habits of general publicity, with a withdrawing room for the purpose of occasional secrecy, would, as above, have been the true and only remedy. But in that country (as under the Roman system, wheresoever in use) the whole system was too radically bad to admit of this or any other remedy.

The judge who, sitting singly, takes all examinations in his closet, might have been required, under the requisite limitations and exceptions, to take them in open court. Few things would have been more easy, but nothing more radical, than such a change.

\* Book IX. EXCLUSION. Part II. PROPER.

sometimes with propriety be shut against evidence. But if, in any case, without preponderant inconvenience, the door of justice may be shut against the evidence itself; with much less inconvenience may it in that same case be shut against this or that individual, or against the public at large, in quality of co-auditors of the evidence.

By means of this temperament, the direct ends of justice may be fulfilled, in many instances in which otherwise it might have been necessary to make a complete sacrifice of them to the collateral ends. The light of evidence, instead of being extinguished altogether, may be set to shine under a bushel: under a bushel, and, nevertheless, though in so confined a situation, fulfil its office.

Of these considerations, if just, the following is the use which (it should seem) might be made in practice.

In cases in which punishment, for the benefit of the public, and for the sake of example, is out of the question, the subject of the contest being some matter of private right; supposing it sufficiently established that either party was desirous of substituting the private to the public mode, and the other not averse to it; it might, generally speaking, be of use, that, (unless for special cause to be assigned by himself), the judge should, on the petition of either party, substitute to the ordinary or public the private mode.\*

\* The proper mode of limitation seems not unobvious: particular individuals on both sides to stand excluded, with or without consent, by authority of the judge. Under the

By a regulation to this effect, no small part of the vexation incident to litigation might be saved : a species of vexation, teeming with a degree of suffering frequently exceeding in its amount that which is produced by the expense, even under the vast increase which such part of the expense as is necessary and unavoidable receives from the amount of such part as is factitious and useless.

Against an arrangement to this effect, three objections may be apt to present themselves.

1. One is, that, by intimidation, this or that one of the litigants may be (as it were) compelled to join in the application ; or at any rate to forbear opposing it.

2. Another is, that, in a case in which it would have been for his advantage that the proceeding should have been public, he may, by false or fallacious representations, have been deceived into the giving his consent to its being carried on in the private mode.

3. A third is, that, in many instances in which the private mode is substituted (as above) to the public mode, the use of the theatre of justice in the character of a school of moral instruction will be done away.

To the first and second objections it may be

same authority, persons admissible on each side, to be settled (either individually, or only as to number), by blank tickets of admission delivered to the respective parties.

The principal and only constant use of publicity is reducible to the setting, as a watch over the conduct of the judge, such persons as, in case of misconduct on his part, may naturally be expected not to be backward in proclaiming it. The inspecting eyes of a few persons thus selected, would be more steadily effectual than those of a promiscuous multitude.

answered, that, against the mischief thus apprehended, two remedies present themselves.

One consists in the probity of the judge. If in his opinion the case is of the number of those in which publicity would have been more subservient to the purposes of justice than privacy; in this case,—though the possibility of letting in the public at large in the character of spectators is gone by,—yet, by himself, or by some person under his direction, minutes having been taken of what passed,—it will rest with him to take order for the publication of those minutes, laying the burthen of the expense on whichever shoulders seem best adapted for it.

If, in the course taken by any party for the obtaining the consent of any other to the substitution of the private to the public mode, any sign of intimidation or fraud should be observed; it may rest with him to inflict moreover on the offending party whatever censure may appear suitable to the case, viz. by expression of disapprobation, or by addition made to the expense of divulgation (as by adding to the number of copies to be printed at the offender's expense), &c.

The punishment will then be analogous to the offence: and that in such a way as to give it its best chance of being efficacious. Good repute was the possession, to the value of which his sensibility stands indicated and proved, by the sinister course which he took for the preservation of it: reputation is accordingly the possession upon which the punishment attaches, in such a way as to make a defalcation from it.

The other remedy is one that may be left in

the hands of the party himself. This remedy consists in the liberty of printing and publishing the minutes at his own expense.

For the purpose of doing all that in this case seems proper or necessary to be done for the repression of such inconvenience as is liable to be produced by such publication, in cases in which the suffering produced by it will be excessive,—the judge might be allowed to mark upon the minutes his disapprobation of any such publication: which note of censure, the party who persists notwithstanding in the design of publication, shall be under the obligation of including in it.

Here then, should publication be made notwithstanding, the effect of it will be to prefer as it were an appeal to the bar of the public from the decision pronounced as to this point by the judge. In this way, between the judge and the litigant in question, a sort of silent litigation will take place, in the course of which the judge will act (as it is desirable he should) with all that advantage which it is in the nature of his commanding situation to put into the hands of him who occupies it.

To the third objection, two answers present themselves.

One is, that, to whatever services the theatre of justice is capable of being made to render to society in the character of a school of moral instruction, no determinate number of causes is necessary. When all are defalcated which the purpose here in question requires to be defalcated, there seems no determinate ground for any such apprehension as that the remainder will not be sufficient for this collateral purpose.

The other is, that,—forasmuch as, in every such case, it would be in the power of the parties (agreeing in the manner in question) to deprive the public of the use of the theatre of justice in the character in question, either by not commencing the suit, or by compromising it, (in which case the public would also be deprived of the use of it in that its principal character); any such inferior loss, as (to preserve individuals from unnecessary vexation) the public may be subjected to in respect of this collateral and inferior use, seems the less to be regretted.

In causes in which the peace and honour of families is concerned, so long as there is any hope of reconciliation, there cannot be any sufficient objection to secrecy.

Publicity in these cases (understand always if administered in the first instance) can have no better effect than that of pouring poison into whatever wounds have already been sustained.\*

\* In the account given of the species of tribunals established in the Danish dominions under a name corresponding to that of Reconciliation Offices, secrecy is spoken of as a universally extensive and inviolable law.

Reasons may be conceived, which, under an institution circumstanced as that was, might operate in justification of that universality, at the same time without lessening its incompetence in the character of a general principle in judicature.

1. From the cognizance of that institution, the class of causes in which generally the demand for the principle of publicity is at its highest pitch (viz. penal causes) are exempted.

2. It is obvious, as already observed, how intimate the connection is between secrecy of procedure and hope of reconciliation.

3. The powers of that extraordinary tribunal do not extend to the pronouncing a definitive decision, unless by

Should the pacific endeavours of the judge have proved ineffectual; should reconciliation prove hopeless, hostility and suspicion still

consent of parties. Supposing, therefore, that, in the ordinary courts, the course of proceeding has more or less of the light of publicity to illuminate it; this light it rests with the party to take the full benefit of, if he please. The decision of the Reconciliation Court is pronounced: is he satisfied with it?—publicity is of no use to him. Is he dissatisfied?—the ordinary courts are open to him: do they afford publicity? he has the benefit of it: do they refuse it? the secrecy of the procedure in the Reconciliation Courts is at any rate no new imperfection in the system of judicature.

4. At the commencement of the institution in question, it was natural that the persons to whom the management of it was intrusted should be persons at once possessing and deserving the highest share of public confidence: stimulated, and at the same time confined within the pale of probity, by that enthusiasm, without which no considerable reforms can ever be so much as attempted. The demand for publicity in its most essential character, that of a check to improbity, might, therefore, in these individual instances, be not altogether without reason considered as superseded and rendered unnecessary. But a confidence of this sort, how well soever placed in those individual instances, might be very much misplaced, if, by being rendered perpetual, it were extended to an indefinite line of successors; of whom nothing could be known, except that to their case no such securities for zeal and probity as above described would have any application.

5. Of this extraordinary system of tribunals, the object—the principal, if not only, object—was the rescuing the people from the depredation which, in that country as well as in every other, has, under the auspices of the technical system, been the real object of the established course of procedure. The sensations excited in the breasts of the men of law of all descriptions (official and professional) attached to the regular tribunals, would, of course, be such as those with which a flock of half-starved wolves might be supposed to be tormented, when a flock of sheep has just been rescued by the shepherd from their fangs.

In this state of things, any little errors into which the newly-established magistrates might chance to fall, any weaknesses which it might happen to them to betray, would of

alive and seeking every advantage; then is the time for either of the parties (though even then at his peril) to demand his pound of flesh, his right of tormenting his adversary, by dragging into daylight all those shades in his character, which (for the tranquillity or reputation of one or both parties, their families, and other connections) had better have remained in darkness. I say at his peril: for if, upon the continuance and completion (that is, in part, if necessary, the repetition) of the investigation in public, it should appear that this sort of appeal had for its cause the malignant satisfaction of inflicting on the adversary this species of vexation, and that no real apprehension of partiality or misconduct in any other shape bore any part of it,—there seems no reason why malicious vexation in this shape should go unpunished, any more than in any other. The character in which the vexation operates is that of an offence against reputation; an offence of which the hand of the judge, as in case of conviction on a false accusation, has been made the unwilling instrument.

Let but the right of appeal be reserved; in that case,—though in the court below publicity were ultimately and peremptorily refused by the judge,—the only serious part of the mischief against which publicity is particularly calculated to operate as a security, would be avoided. At the Court of Appeal, it is here assumed that,

course be fastened upon with avidity, commented upon with malignity, painted in aggravated colours, and circulated with unwearied assiduity in all circles from which defeat or obstruction to the new system could be hoped. Against such hostility, secrecy, if not a necessary or eligible, was at any rate a very natural, and at least excusable, defence.

sooner or later, even in causes in which the demand for secrecy is the strongest, it is in the power of the appellant (always at his peril) to force publicity.

But such (it may be still observed) is sometimes the force of malice, that, notwithstanding any punishment that can be thus denounced, one of the parties, for the pleasure of injuring the reputation of the other—of perpetrating the mischief, whatever it be, to which the family or any part of it is exposed,—will persevere to the last in the demand of publicity. Possibly: since men are every now and then to be found, who, for the pleasure of depriving an adversary of life, are content to risk their own. Against defamation, when practised in any of the ordinary ways, by word of mouth, by writing, or in print, the punishments appointed for that offence are not always effectual. True: but that is no more than may be said of every other sort of offence, and every other sort of punishment: and after all, the worst mischief arising from publicity is always a limited one: whereas the mischief attached to inviolable secrecy in judicature is altogether boundless. Whatever may be the punishment annexed to defamation when committed in any of the ordinary ways, and whatever in these cases may be its degree of efficacy; a much superior degree of efficacy may be expected from it where it has for its object defamation committed or attempted to be committed in this extraordinary way. In the former case, the passion finds nothing to oppose it: in the latter case, it finds itself opposed by whatever can be done either in the way of advice or examination, by the authority of the judge.

Finding security, (security purely pecuniary, constituted by the apprehension of the loss of a fixed sum of money), is the remedy in common use against known or apprehended malice : and among the instances in which it is employed, how small is the proportion of those in which it fails of answering its intended purpose !

Purpose 6. Regard to decency.

Among the cases in which the demand for secrecy is created by a regard to the peace and honour of individuals and families, those in which the injury has its root in the sexual appetite claim the like attention by this additional title.

If, on this score, it be proper that exclusion from the right of attendance should be pronounced upon any description of persons, by the authority of the legislator and the judge ; the classes it would fall upon would naturally be, the female sex in general, and, in both sexes, minors below a certain age : more especially in the case of any of those irregularities of the sexual appetite, in which the error regards the species or the sex.

On a subject of this sort, reason stands so little chance of being regarded, that reasoning would be but ill bestowed. The topic being thus brought to view, discussion and decision may be abandoned to those in whose eyes all the others might comparatively appear of small importance.

Minors being under power, it will rest with parents and guardians to keep them out of such scenes, or of any other such scenes by which their morals may be put in jeopardy. Answer *per contrà*,—it is easier for the judge to guard the

entrance into court, than for a parent or guardian to guard all the roads that lead to it.

How shall age be tried for this purpose ? An attempt to try age by view produced the insurrection under Wat Tyler and Jack Straw. A discretionary power of exclusion on this ground to be exercised on view, (view of the countenance without ulterior scrutiny), shall it be lodged in the hands of the judge ?

In England, the resort of persons of the female sex to scenes so little suited to female delicacy has been a frequent subject of animadversion. Exclusion in this case (supposing it worth while) could no otherwise be effected than by the authority of the judge. The subject, however, can scarcely present itself as of light importance to the sort of reformers who of late years have busied themselves so much about print-shops ; and who, when they have excluded loose characters from this or that house or garden, conceive themselves to have extinguished looseness : like those politicians, who, when, without increasing capital, they have increased the number of places capable of being traded with, conceive themselves to have increased trade.

Suppose courts of justice as well as print-shops sufficiently fenced, what is to be done with bathing places ? amongst others with the sea coast and the shores of rivers ?\*

\* When a person of the female sex has received an insult of a nature offensive to decency, (especially if to youth and virginity refined habits of life be added), it is no small aggravation of the injury to be obliged, on pain of seeing the author triumph in impunity, to come forward, as in England, and give a description of it, in the face of a mixed and for-

Purpose 7. Preservation of state secrets from disclosure.

To give the question a body, and that the discussion may be somewhat more useful than a mutual beating of the air in the dark, let us frame a feigned case out of a real one. On the occasion of the peace that ensued in 1806, between France and Austria, after the battle of Austerlitz, and the change that took place soon afterwards in the British administration, parliament received from the departing ministry a communication of the negotiations that had preceded the rupture terminated by that peace. The communication thus made was charged with imprudence: the military weakness of

midable company of starers, many of them adversaries. Females have been seen to faint under such trials. The endeavour on the part of lovers and male relations to supply in this respect the deficiencies of law, is among the causes that give birth to duels. When death ensues, then comes the judge, who, in the case of this species of misery, taught by his books to regard the difference between consent and non-consent as of no importance, urges the jury to consign the defender of a sister or a daughter's honour, to the fate allotted to midnight assassins and incendiaries.

When the injury is greater, as in case of rape, the trial of the injured is less severe. By the horror of the crime, and the idea of the punishment, lighter thoughts are to a certain degree subdued in the bosoms of the audience: while the like sentiments, acting as a stimulus on the mind of the injured sufferer, support her spirits under the conflict.

When life, the life of the defendant, is at stake, any additional danger that might be looked upon as attendant upon a mode of examination comparatively secret, might appear to some too high a price to pay for the preservation of female delicacy. Place that catastrophe out of the question, the proportion between inconvenience and inconvenience will shew itself in a point of view materially different; the suffering of the injured, greater; the danger to the supposed injurer, of less magnitude.

your late unfortunate allies, the weakness of their councils, the intellectual weakness of the persons by whom those counsels were conducted, the designs entertained in your favour by other powers who were in a way to become your allies, all these (it was said) you have betrayed : such is the imprudence, and what is the probable consequence ? That, on future contingent occasions, powers who otherwise might have become your allies, will shrink from your alliance, deterred by the apprehension of the like imprudence.

Such was the imputation : as to the justice or injustice of it, it is altogether foreign to the present purpose. To adapt the case to the present purpose ; suppose that the conduct of the British administration, antecedently to that disaster, had been made the subject of a charge of corruption : and suppose that, for the pronouncing a judicial decision upon that charge, it would have been necessary that the communication spontaneously made as above should have been produced in the character of evidence : and, for the argument's sake, suppose it sufficiently established, that, from the unrestricted publicity of that evidence, the inconveniences above spoken of would have ensued ; and that the weight of those circumstances would have been preponderant over any advantage that could have been produced by the punishment of the persons participating in that crime.

Here then would have been two great evils, one of which, under the system of inflexible publicity, must necessarily have been submitted to : on the one hand, impunity and conse-

quent encouragement to a public crime of the most dangerous description : on the other hand, offence given to foreign powers, and the country eventually deprived of assistance which might be necessary to its preservation.

By a considerate relaxation of a system, which, inestimably beneficial as it has been in its general tendency, was introduced without consideration, and has been pursued in the same manner, both these evils might in the supposed case in question be avoided.

To give a detailed plan for this ideal purpose would occupy more space than could be spared. But, as to leading principles, precedents not inadequate to the purpose might be found without straying out of the field of English practice. The privacy of Secret Committees, though as yet confined to preparatory inquiry, might on an emergency of this sort be extended to definitive judicature : the mode in which, in equity procedure, the examining judges are appointed by the parties, appointed out of a body of men to a certain degree select,—and (to come nearer the mark) the mode in which two of the fifteen judges are chosen in the House of Commons for the trial of election causes,—would afford a more promising security for impartiality than could be afforded by any committee chosen (though it were in the way of ballot) in either House.

#### SECTION IV.—*Precautions to be observed in the application of the principle of privacy.*

Whatever be the restriction applied to the principle of absolute publicity, care must be

taken that the mischief resulting from the restriction be not preponderant over the advantage: that the advantage consisting in the avoidance of vexation (the inconvenience opposite to the collateral ends of justice), be not outweighed by any considerable abatement of the security necessary with reference to the direct ends, or rather to all the ends, of justice.

The following are a few precautions, by the observance of which, whatever advantage depending on the relaxation of the principle of publicity be pursued, the more important security afforded by the general observance of that principle may (it should seem) be maintained either altogether undiminished, or without any diminution worth regarding.

1. In no case should the concealment be foreknown to be perpetual and indefinite. For to admit of any such case, would be to confer on the judge under whose direction the evidence were to be collected and the inquiry in other respects carried on, a power completely arbitrary: since, in relation to the business in question, let his conduct be ever so flagitious and indefensible, by the supposition he is by means of the concealment in question completely protected from every unpleasant consequence; protected not only against punishment, legal punishment, but against shame.

At all events, in the hands of every party interested must be lodged, (to be exercised on some terms or other), in the first place, the power of establishing each act, each word, by proper memorials; in the next place, the power of eventually bringing those memorials to light. If, in the case of a secret scrutiny, the exami-

nation be performed *vivâ voce*; questions and answers both should be minuted, *ipsissimis verbis*, and the authenticity of the minutes established in the strictest and most satisfactory mode.

2. In no case let the privacy extend beyond the purpose: let no degree of privacy be produced (if one may so say) in waste. For, every restriction put upon publicity, in tendency at least (whether in actual effect or not) infringes upon the habit, and weakens the sense, of responsibility, on the part of the judge.

3. Care in particular should be taken not to have two different sets of tribunals; one of them reserved for secret causes. The tribunals reserved for secret causes will be so many seats of despotism: more especially if composed of judges who never judge but in secret. Under a judge trained up (as it were) from infancy to act under the controul of the public eye, secresy in this or that particular cause will be comparatively exempt from danger: the sense of responsibility, the habit of salutary self-restraint, formed under the discipline of the public school, will not be suddenly thrown off in the closet.

4. Instead of secret courts, of which there should not any where be a single one, let there be to every court a private chamber or withdrawing room: behind the bench, a door opening into a small apartment, into which the judge, calling to him the persons requisite, may withdraw one minute, and return the next, the audience in the court remaining undisplaced.\*

\* In this way no such affront would be put upon the public as is habitually, and (though naturally enough) not

In this way, just so much of the enquiry is kept secret as the purpose requires to be kept secret, and no more. In one and the same cause, the interrogation of one deponent may be performed in secret, that of another in public: even of the same deponent, one part of the examination may be performed in the one mode, another in the other mode.

#### SECTION V.—*Cases particularly unmeet for privacy.*

In cases of a non-criminal nature, between individual and individual,—so long as the faculty of attendance for himself and a sufficient number of his nominees is secured to each person having a distinct interest in the cause,—the privacy can be attended with no other inconvenience except the loss of the casual security afforded for the correctness and completeness of the evidence, by the chance of ulterior witnesses, as above explained, (a chance which will only apply to here and there a particular case), and the infringement made in the habit of responsibility on the part of the judge.

In the case of offences of a criminal nature,—and in particular those in the punishment of which the members of the government\* or the

necessarily, put upon it, in the two houses of the British parliament, by the operation of *clearing* the house.

\* *E. g.* Endeavours to overturn the government: endeavours to excite resistance to the government: endeavours to injure the reputation of the governing body, or this or that particular member of it: actions against any member of the governing body for abuse of the powers or functions attached to his station: election causes: suits relative to the right of occupying this or that public station.

public at large\* have an interest,—privacy is far from being equally exempt from danger.

The interest which the public at large have in the conformity of the procedure to the several ends of justice, added to the general reasons that plead in favour of publicity (as above), seem sufficient to establish the rule of unrestrained publicity in the character of the general rule. What remains to be considered, is,—whether, among the above-mentioned reasons in favour of privacy, there be any which in a case of this class can constitute a sufficient ground for the establishment of an exception to that general rule.

1. The judge without the concurrence of either party, the judge alone, could not present so much as a colourable reason for any mode or degree of privacy.

2. Nor yet the judge and the prosecutor together. In other words, it would not be eligible that the judge, at the instance of the prosecutor alone, should, for any cause, withdraw the procedure from the cognizance of the public at large.

Whatsoever be the form of government,—monarchical, aristocratical, democratical, or mixed; the sort of dependence or connection which can scarcely fail of subsisting, as between the judge and the members of the administration, is such, that, to a person in the situation of defendant in any cause in which any member of that body (as such) has any personal interest, the eventual protection of the public eye is a security too important to be foregone: the vex-

\* Predatory offences—theft, highway robbery, house-breaking: rape: incendiarism: homicide, in some cases.

ation, the greatest vexation, that could beset the public functionary for want of that privacy which, in a case between individual and individual, might without preponderant danger be allowed, would be confined to the individual: but, in case of misdecision to the prejudice of the defendant, and undue punishment in consequence, (besides that to the individual the affliction of the punishment in this case would be so much greater than that of the vexation on the other), the alarm which a bare suspicion of such unjust punishment is calculated to excite, would, in respect of its extent, be an additional and more serious evil: and, although there were no other cause, the simple fact of a desire on the part of the prosecutor and a consent on the part of the judge to withdraw the procedure from the cognizance of the public eye, would of itself be a ground of alarm, neither unnatural nor unreasonable.

The minutes being in this case taken, and taken *ipsissimis verbis*; if, when the proof had been closed, the minutes were to be read in the presence of the defendant and of the open committee of the public,—if, in answer to appropriate questions, the defendant were then, in the presence of the public, to recognize the correctness of the statement,—the security thus afforded to him against misrepresentation, would (it might be supposed) be sufficient for the purpose.

If, however, throughout the whole of his examination, the defendant were to be altogether destitute of assistance and support, (as in Roman procedure is actually the case), no such security would be sufficient. Having no one to bear witness for him, intimidations of all kinds may, on

the part of the judge, or on the part of the judge and prosecutor, be applied to him, and (if unsuccessful) disavowed. On the occasion of the public hearing (as above), it may happen to him to come ready-instructed, and by such irresistible authority, what to say, and what not to say.

Corrupt indeed must be the state of justice, where such abuses are not at the worst extremely rare: but (be the abuse itself ever so rare) what in the midst of such darkness cannot reasonably be expected to be rare, is the apprehension of it.

What if, no such abuse being really practised, the defendant, temerarily, or through *mala fides*, should set up a false complaint of it? If indeed he is prudent, and at the same time not without hope of what is called mercy (absolute or comparative), he certainly will not pursue a course at once so injurious and so offensive. But, that hope of mercy should be altogether wanting, cannot in a case of this class be an unfrequent occurrence: nor yet, where revenge can promise itself an immediate gratification, is any such imprudence out of nature.

Under every government, cases will occur, in which (not to speak of pretences) there may be just grounds, for wishing that the evidence may be, more or less of it, kept secret: suppose, for example, the occasion of the supposed offence to be a transaction, the disclosure of which would betray the military projects or the military weakness of the state; or a transaction, exposing to obloquy the conduct of some foreign state. Be the mischief of publicity preponderant or not, few indeed will be the political states (none, perhaps, but the English and the Anglo-Ameri-

can) in which the members of the administration whose conduct might by the disclosure be exposed to censure, would have self-denial sufficient to forbear availing themselves of the plea for withdrawing it from the scrutiny of the public eye.

In a case of this kind, a sort of middle course might be observed. In the class of professional lawyers, there can never be wanting, in every country, men of reputation, adequate to be trusted with such secrets, if bound to secrecy by an oath, or other the most solemn engagement in use. Out of a list formed for this purpose, but formed at a period anterior to that in which the individual cause could have come into contemplation, let the defendant, in such case, have the liberty of choice. The professional assistant thus chosen, without being near enough to prompt the defendant in his answers, might be present to the purpose of witnessing any impropriety of conduct (supposing it to take place) on the part of the judge, and by that means to serve as a security against its taking place, and to attest its not having taken place.

What if the defendant should be too poor to pay, on the occasion, the price of professional assistance? He must, on this as on other occasions, obtain it through charity, or remain destitute of it. But in a case of this sort, which is always a case of extensive expectation and interest, charity for this purpose can scarcely fail of being at hand, either on the part of sellers, or on the part of purchasers.

3. Nor yet would it be conducive to the ends of justice, that, in a case of this description, it should rest with the judge to withdraw the pro-

cedure from the cognizance of the public at large, at the instance of a defendant; at any rate so to withdraw it, but that the prosecutor (if there be one) be present on each examination, with at least one professional assistant, by way of witness, at his choice. Without this check (supposing, on the part of the judge, any undue partiality in favour of the defendant's side) matters might easily be so arranged, as that the acquittal of the defendant, though guilty, might be the result; and this without being productive of any of that disrepute, which would naturally attach upon the conduct of the judge who should give impunity to a malefactor whose guilt was written in legible characters upon the face of the evidence.

The objection to the privacy extends not, however, beyond the case in which,—in consideration of the interest which the public at large has in the suppression of the offence,—the judge stands interdicted from remitting the punishment attached to it. For wherever the power of remission obtains, the worst that can happen from the privacy, is the exercise of that same power; the exercise of it in an indirect way, instead of a direct one.

4. Nor yet, in the class of cases in question, would it be eligible that the mode of privacy in question should take place, although it were even at the joint solicitation of both parties (or say all parties), as well as with the consent of the judge.

The reason is, that here (as before) there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less ex-

plicit, between the other persons concerned (the judge included) be made a sacrifice. Here (as before) if the case be of the number of those in which, by the concurrence of those several parties (or, much more, if by any two or one of them) the punishment incurred or supposed to be incurred by the defendant, may avowedly be remitted; the objection against privacy extends not to this case.

So publication in the scriptural mode were kept open, privacy, as against publicity in the *viva voce* mode (it might seem) might be maintained without inconvenience; at any rate, if ultimate decision and execution were not admitted till the public had had time sufficient for taking cognizance of the communication made to it.

Several causes, however, concur in preventing the latter of these securities from being an equivalent to both together.

In the first place, it is not the whole of the evidence that is capable of being expressed by writing. Deportment (an article constituting a considerable branch of circumstantial evidence, and itself distinguishable into a considerable number of varieties) is an article not communicable but in a very imperfect manner, to any that are not at once auditors and spectators.

In the next place, the discourse published under the name of the depositions delivered *viva voce* on the occasion in question, is it really, in tenor or in purport, the very evidence, neither more nor less, than what, on that time or occasion, was actually delivered? For the completeness, as well as correctness, of the evidence, the presence of an unrestricted assemblage of bystanders affords a security which on some

occasions may be absolutely necessary to the prevention of misconduct on the part of the judge (misconduct, the fruit of which may be the violation of all the ends of justice): a security, of which, in some cases, privacy, as against publicity in the *vivâ voce* mode, may be absolutely destructive.

In the third place, (the evidence being, or not being, represented as it was actually delivered)—that which was delivered under the degree of privacy in question, is it exactly the same as would have been delivered had the conduct of the judge been carried on under the controul of the public eye, in a state of unrestricted publicity?

The advantages of publicity,—whether considered in themselves, or in comparison with the advantages of secrecy (*i. e.* with the disadvantages of publicity) in the several cases in which the demand for secrecy presents itself,—will be apt to appear different, according to the state of the constitutional branch of law in the country in question; according as the degree of influence possessed by the body of the people is more or less considerable. Under the republican institutions of British America (for example) it is evident that the value set upon publicity should be at the highest pitch: nor in this respect should one expect to see British Europe in any considerable degree behind.

Not that, in respect of the real value of publicity in this character of a security for good judicature, there is any very distinct and assignable difference. But in monarchies, the difficulty (if there be any) will naturally be to prevail on the government to give to the application

of the principle of *publicity* the extent which abstract utility would require: under a mixed constitution like the British, or a republican constitution like the Anglo-American, the difficulty would be to prevail on the people to view with complacency any such extent given to the principle of *privacy* as the dictates of abstract utility might be thought to require.

The class of causes in which, under a constitution more or less popular, it is more particularly material that the principle of publicity should be maintained, are such as may be termed constitutional causes: causes in which the government of the country may naturally be expected to take a more particular interest, and in which (if in any) the sinister influence of government (that is of the other members of government) might be apprehended as likely to act with effect in the character of a sinister influence upon the probity of the judge. Such, for example, are—

1. *In penali*, Prosecutions for endeavours to subvert the government.
2. Prosecutions for endeavours to excite resistance to the power of government on this or that particular occasion.
3. Prosecutions for endeavours to injure the reputation of the public functionaries of the higher orders.
4. Actions by individuals against the public functionaries, especially of the higher orders, for abuse of power or influence.
5. *In non-penali*, Election causes: suits in which the right to the possession of this or that public office is the subject-matter in dispute.

Of all these sorts of causes (which, however,

are given but as examples), there is not any one that comes within any of the classes marked out for secrecy. Thus far, therefore, the advocate of a popular constitution need find no objection to the application of that principle.

Even under the most absolute monarchy, in a constitutional cause (as above described) it will not often happen to the sovereign to wish to see injustice done; it can never happen to him to be content to be regarded as harbouring such a wish.

In all cases, therefore, except such in which he is seriously anxious that injustice should be done, he might at least suffer the *evidence* to be collected in public, without prejudice to his wishes.

But the arguments?—the arguments of advocates in favour of the prisoner, might it not happen to them to be delivered in too popular a tone; especially where a question of law came to be discussed? In pursuit of professional celebrity and the praise of eloquence, might it not be a natural endeavour on the part of the advocate to raise the spirit of the people, and point their passions against the existing order of things?—Supposing this inconvenience a preponderant one, the bar of secrecy might be applied to these effusions of rhetoric, leaving the evidence to be collected in public notwithstanding.

English jurisprudence, supposing it on this ground to rest upon any rational principle, goes much farther in this track. In penal causes of the rank of felonies (high treason only excepted, and that by statute) it imposes absolute silence upon the defendant's advocate, so far as the

question of fact is on the carpet. So jealous were the founders of the system, of the power of professional rhetoric over the affections of their favourite class of judges,—so jealous (always supposing them to have consulted reason on the subject, which very likely they never did) that by putting a gag into the mouths of the advocates, they determined to give the same sort of security to their judges that Ulysses, when amongst the Syrens, gave to his companions—by putting wax into their ears.

If there were no other option than between publicity in all cases and secrecy in all cases, there can be no doubt in favour of which side it ought to declare itself. It is only in here and there a particular case, that secrecy is of any use—that publicity is liable to be productive of any inconvenience. The inconvenience, where it does happen, confines itself to a few individuals, and that in a few sorts of causes: the evil attached to secret judicature strikes against the whole body of the community; deprives the public of an indispensable security for good judicature; runs counter to all the ends of justice.

#### SECTION VI.—*Errors of Roman and English law in respect to publicity and privacy.*

Such (as far as it can be represented by rough outline) is the course which, as between publicity and privacy, seems, at the present advanced state of society, to be naturally suggested by a solicitous and attentive regard to the ends of justice.

Such, or not very different from it, would

have been the course pursued in the civilized states of Europe, and in England in particular, if, being devised and put together at any such advanced stage in the career of civilization, they had had for their authors men who had proposed to themselves the ends of justice as the main object by which their labours were to be guided, and towards which they were to be directed.

At the time when the system of procedure had arrived at such a stage as to have taken a form and character from which it could not, without an extensive and sudden change of lights and views and interests, be divested; unhappily, both the two elements of aptitude, the two requisites to the pursuit of the right path as above sketched out, (viz. probity and wisdom) were, on the part of those in whose hands the power was lodged, everywhere wanting.

In every country, the fashioning of the main body of the laws, and with it of its necessary appendage the system of procedure, was in the hands of men who, from the blindness which had place as well below them as above them, derived the faculty of taking for the main object of their exertions and arrangements their own personal, separate, and sinister interest:—the interest of the public, of the community in general, and thence the ends of justice, being either in no degree at all, or at best in a very subordinate and inferior degree, the objects of their regard.

For the pursuit of those sinister ends, everywhere the stock of wisdom existing on the part of this class of men was abundantly sufficient: while, for the pursuing of the several ends of

justice on every occasion by the most direct and proper course, even had the suggestions of probity been listened to, the stock of wisdom could not but (as we go farther and farther back in the track of history, cutting off thereby more and more of the now-accumulated stock of experience) have been proportionably deficient.

Two opposite systems, the English and the Roman,—both of them harsh, unreflecting and unbending, both of them running to extremes, blindly pursuing a general principle to the neglect or contempt of all requisite exceptions,—divided between them, in England itself, the field of power: while, upon the continent of Europe, the principle of privacy, pushed to the pitch of absolute secrecy, covered the whole expanse.

In the Roman procedure, as exemplified on the continent, the whole business of examination is performed *in secreto judicis*: in a place which, whether actually the private closet of the judge or not, is at any rate equally inaccessible to the public at large. Screened by this means almost entirely from the force of the moral sanction, from the tutelary inspection of the public eye; improbity, and (what is still more common) indolence and indifference, may accomplish their ends with comparatively little risk. The court above (for, under the Roman law, the check of appeal, being the only one, is almost uniformly applied)—the court above, were they to discover any marks of improbity apparent to their eyes, would naturally prevent it from taking effect. But under the system of privacy, it is only from the information given them by the inferior judges themselves, that the

superior judges obtain what information they acquire concerning what is done by those inferior judges. In case of mere indolence, impropriety of conduct may rise to such a degree as to be continually giving birth to wrong decision, and frustrating the purposes of justice, without betraying itself by any such indications as would necessarily find their way to the eye of the court above. And in case of improbity, or prepossession; if the seducing motive or prejudice were either imbibed by the inferior judges from the superior, or shared with them in any other way; a check which at best (as we have seen) is but inadequate, would by that means be reduced to nothing.

Happily for England, that one of the two rival principles to which good fortune rather than wisdom had given the ascendant, was the principle of publicity. At first the small body of men who in each district, under the name of freeholders, lorded it over a larger body of slaves and other humble dependants,—then by degrees a sort of select committee of that body,—gained or preserved, together with the right of access and the duty of attendance, a sort of influence which (by the favour of fortune) operated as a check upon the king's completely dependant creatures, who in this department of government operated as instruments of his will under the name of judges.

But of the attendance of every such tribe of assessors,—whether the promiscuous body of freeholders, or the committee of twelve under the name of jurors,—publicity, (and that in a degree unrestrained by any bounds but such as in this or that place came to be applied by

casual and local and accidental circumstances) became a natural, and, as good fortune would have it, at length an inseparable, concomitant.

In English judicature, therefore, the principle of publicity predominates over the principle of secrecy; and it is to this predominance, added to two or three other very simple principles, and not the less salutary for being simple,\* that, taken in the aggregate, the system of procedure is indebted for its being perhaps the least bad extant, instead of being among the worst.

In English judicature, the genius of publicity predominates over its antagonist. In some parts of the system it is established: and in those parts loud and universal and incessant are the praises of it. In other parts it is discarded: in those parts the principle of secrecy is watched over with a degree of attention and anxiety much beyond what is manifested for the maintenance of publicity. Publicity is adored, secrecy cultivated: in despite of adages, in despite of consistency, God and Mammon are served in the same breath.

In common law, all is light: in equity law, all is darkness. The light is admirable: the darkness no less admirable. Think not that the darkness, where darkness reigns, has any rational cause, or anything approaching to a rational cause. The circumstances presenting a demand for secrecy have above been brought to view: scarce any of them have any application

\* Such as cross-examination and the use of juries, however inconsistently, scantily, redundantly, and inappropriately applied.

to any of the sorts of causes of which equity takes cognizance. At any rate, if a selection were made of the sorts of causes least apt to present a demand for secrecy, those of which equity takes cognizance might stand first upon the list. "I think, therefore I exist," was the argument of Des Cartes: I exist, therefore I have no need to think or be thought about, is the argument of jurisprudence.

What are and what are not equity causes, I cannot (happily it is not here necessary) undertake to say: those by whom this exquisite sort of law is administered, do not themselves so much as profess to know. Two things however a man may venture to say, with some assurance: that there is not any sort of fact whatever inquired after in this extraordinary, this less trustworthy, this secret mode, that may not at any time be sent to be inquired after in the ordinary, the more trustworthy, the public mode, by virtue of what is called *directing an issue*: that,—in this division of cases, to which the capacity of being inquired after in the secret mode is confined,—the sorts of transactions in which the peace and honour of families are most liable to be wounded, those in which the laws of decency are most liable to be violated, and those in which pecuniary credit is most liable to be injured, are not comprised.

The reason for this secrecy (for there is a reason for it) is altogether curious: it is lest the evidence delivered on each side should be opposed by counter-evidence delivered on the other.

And why not suffer the testimony to undergo this correction and completion? Why

not? (for this reason has likewise its reason, its superior reason). Why not?—for fear of perjury.\* Such is the reason for not suffering

\* Gilbert's Forum Romanum, p. 109. "But if the supplemental bill be moved for after publication" [viz. of the depositions taken in consequence of the original bill], "the court never gives them leave to examine anything that was in issue in the former cause, by reason of the manifest danger of subornation of perjury, where they have a sight of the examination of the witnesses."

P. 117. "One of the judges of the court himself anciently examined, and therefore he might form the interrogations out of the articles as he pleased; but the adverse party was to exhibit interrogations for the judge to examine upon; because the matter upon which the defendant might cross-examine to invalidate, might not be within the articles; but no copies of the interrogatories were to be given to the adverse party." [N. B. The above in the Roman Law.]

P. 120. "Afterwards," [after expiration of rule to shew cause why publication should not pass], "there could be no examination of witnesses, unless by the special direction of the judge, upon good cause shown, and an affidavit of the party, that he, or those employed by him, had not, nor would see the depositions of the witnesses, which were published, by reason of the manifest danger of perjury and subornation of witnesses, in case examinations should be allowed after publication. But after publication there might be *editio instrumentorum*, till the conclusion of the cause, because there was no danger of perjury, upon the proof of such notorious instruments."—[Perjury and subornation they therefore regard as more probable than the honest need of counter-evidence or counter-interrogation. If this were right, this should be a bar to all new trials.]

P. 127. "The first examination by commissioners is not to adjourn without necessity: because that would be to harass the defendant by obliging him to travel from place to place to cross-examine.... And this affair must be performed as far as possible *uno actu*, that there be as little opportunity as possible to divulge the depositions, that neither side may better the proof."

P. 131. "If due notice be given, one side proceeds and examines his witnesses, the other, if he does not examine,

evidence to be opposed by counter-evidence. Had it been the express object of these sages to encourage perjury, few means better adapted to that purpose could have been devised.

shall not have a new commission, unless affidavit be made of some reasonable cause of his non-attendance, and that neither the party who did not examine, nor any for him, or by his direction or knowledge, has seen, heard, or been informed of the depositions taken, or any part of them, nor willingly will see, &c. till he has examined, or till publication: this is, that the defendant may not have an opportunity of knowing what has been proved for the plaintiff, and so be able to contest it."

P. 137. "If it shall appear to the court, by affidavit or certificate of the plaintiff's, that the defendant's commissioners attended during the whole time of the execution of the commission, and never exhibited any interrogatories; in this case the court will never grant the defendant another commission, and he must take it for his pains, since he lay upon the watch and catch, only to see what the plaintiff proved, and then, at another commission, to exhibit interrogatories adapted to such matters and questions as might tend to overthrow all that he had done: and he shall never be admitted to have this unfair advantage over his adversary; for if he is admitted, after having knowledge of all that his adversary has proved, to exhibit interrogatories, he may easily conceive what interrogatories to exhibit, and how to hit the bird in the eye."

P. 138. "And care must be taken (if a new commission is granted) that neither party add to or alter their interrogatories: they must examine upon the old interrogatories, which were exhibited at the former commission, and are not to add any new ones, without special leave from the court, and they are to be settled by a master, and are never done but in extraordinary cases."

P. 141. "And since the very life and vitals of almost every cause, and of every man's property, lies in keeping close, and secreting his evidence, till after the depositions are published, because after that there is an end of examining."

P. 144. "Neither the examinations nor depositions, which are taken by commission, can be published in any case what-

The notion that seems to be implied, and in a manner assumed, in this arrangement and the reasoning by which it is supported, is curious enough. It is, that there exists a sort of natural fund of evidence, upon which it is in every man's power to draw for any quantity for which he happens to have a demand: or else, that every man possesses a sort of manufactory of evidence, in which it depends upon himself to manufacture at any time whatsoever quantity of the article he has occasion for, for his own use.

This unlimited fund of evidence, of what sort is it supposed to be? true and relevant evidence, or false evidence? If true and relevant, what advantage did the legislator propose to justice from the suppression of it? If false evidence, what is there in this arrangement that can tend to discourage the manufacture? The party, who, in consequence of what he has heard of the evidence (true or false) that has been produced by his adversary, sets about the production of false evidence, has therefore as well the will as the power to manufacture false evidence,—whatever false evidence suits his pur-

soever, till publication is duly passed by rule in the office, or by motion or petition, for it may be done either way."

P. 146. "And in this case the plaintiff or defendant (as the case falls out) must make oath, and so must his clerk in court, or solicitor, 'that they have neither seen, heard, read, or been informed of any of the contents of the depositions taken in that cause; nor will they hear, see, read, or be informed of the same, till publication is duly passed in the cause.' And upon such affidavit it is usual for the court to enlarge publication, and give the party an opportunity to examine his witnesses."

pose.—What a supposition! and where is it that anything can be found to countenance it?

Will it be denied that true evidence is rather more frequent, and more easy to obtain, than false evidence? But if so, the evidence suppressed by the arrangement in question is more likely to be true than false.

Is it that evidence is more likely to be false than true? and being false, to be deceptitious? If this theory were correct, the practical inference would be, that the best course to take would be never to receive any evidence at all.

In the criminal branch, the open enquiry is regularly preceded by a secret one.\* To what use the secrecy here? Oh, it had once a use, though the use is gone:—no matter, it is not the less admirable.

The use of the secrecy having for centuries been lost (lost without being missed by any body), the secrecy itself continues. What is the consequence? In the seat of secrecy, what could not but be the consequence,—despotism: in another place, caprice, in this or that odd corner of the field of judicature, taking upon itself to controul that despotism: caprice, acting without rule, and tolerated (though not always without grumbling), because despotism jostled and counteracted by caprice, is better than despotism pure and simple. Would informations in any case be endurable, if, in that same case, grand juries were not a source of impunity, an obstruction in the way of justice?

The original purpose of this secrecy was, to

\* Grand jury.

avoid divulging to the defendant the evidence that might come to be produced against him in the definitive enquiry (called the trial) before the petty jury. Not divulge it to him? why not?—lest, by absconding, he should elude the hands of justice. Observe that at this period he has already heard the evidence against him, defended himself against it as well as he has been able, and is already in the hands of justice.

Another case of secrecy at common law is that of the examination of a married woman, on the occasion of her joining with her husband in the alienation of a landed estate held by them in her right. This in itself has nothing to do with judicature. But some centuries ago the judges of one of the great courts of Westminster Hall (the Common Pleas) having contrived to introduce themselves into a share of that sort of business, which on the continent of Europe is performed by notaries who are not attorneys, and in Britain by attorneys; the ceremony thus described has been introduced accordingly into the list of the ceremonies performed by a judge. Whatsoever may have been the origin of it, the effect is innoxious, (at least if the expense and vexation of personal attendance be laid out of the question), and what was probably the object is laudable. The property originating with the wife, the object was to ascertain that her consent to the parting with it was free, not extorted by ill usage.

The veil of secrecy is thrown over examinations and other enquiries, as carried on in the common law courts, as well as in the equity courts, by the sort of subordinate judge, called

in most instances the Master,—in the other instances designated by some other name, which is regarded as synonymous.\*

The matters of fact inquired into by this sort of subordinate judge, are in general such as are regarded but as accidental with relation to the principal matters on which the cause hinges, and which form the subject of the ultimate decision pronounced by the principal judge or judges.

The business of the Examiner so denominated,—of the subordinate, who, sitting in the office called the examiner's office, collects the personal evidence,—is confined altogether to that narrow function. By him the evidence is collected, but it belongs not to him to pronounce any decision grounded on it. Were he not to commit the testimony to writing, his operations would have neither object nor effect.

Not so the Master. To pronounce decisions is the principal function of his office: another function, subservient to the former, is the making enquiry into the matters of fact on which these decisions are to be grounded. Of the testimony relative to these matters of fact, that he should commit to writing minutes of some sort or other (possibly and eventually for his justification, but at all times for the assistance of his own recollection) may naturally, or rather must necessarily, be presumed. In the present instance, however, everything of this sort is left to chance. For any general propo-

\* On the equity side of the court of Exchequer, the Deputy Remembrancer; in the Common Pleas, the Prothonotary.

sition expressive of the state of the law or the practice on this head, no sufficient warrant is to be found in any printed book of law. How should there? Operations which are left throughout to be the sport of chance, how should they in any way form the subject of a rule?

A cause, on the occasion of which the testimony, after having been extracted and collected in the sunshine of publicity, is carefully committed to writing by judges of the highest rank, may be to any degree destitute of importance. A decision, adjudging to the plaintiff, in the name of damages, the sum of one shilling (a fraction of the value of one day's labour of an ordinary labourer) is in every day's experience; a decision adjudging to him no more than the forty-eighth part of that sum is not without example.

A cause, on the occasion of which the testimony (after having been extracted and collected, in the darkness of a small sitting room, by judges of too low a rank to be spoken of under that respected name) is either committed or not committed to writing,—and (if in any form) in a form more or less adequate or inadequate to the purpose, as indolence, caprice, or any other motive may have prescribed,—may be important to any the highest degree of importance; at least of pecuniary importance.

In the case of the enquiry carried on as above in the examiner's office, secrecy (as hath already been mentioned) is an object expressly avowed, and anxiously provided for. With a degree of strictness not much less anxious than that which is observed on the occasion of those spontaneous and confessional declarations which

in some countries religion is considered as prescribing, the door is avowedly shut against the public at large: against every person besides the two necessary actors in the forensic drama, the examiner and the examinee.

In the case of the enquiry carried on before a Master, no traces of any such anxiety are to be found anywhere in print; no authoritative political bar, visible in that form, has been opposed to the entrance of miscellaneous visitors. Bars of the physical class (such for example as brick walls) are, however, not less efficacious: and of these there is no want. The walls which bound a space in which not more than twenty persons can find standing room, are at least as peremptory a bar to the admission of threescore, as any act that was ever printed in the statute book, or any proclamation that was ever inserted in the Gazette.

An experiment I should not choose to make, is the attempt to gain admission into a master's office, not being attorney, or advocate, or witness about to be examined in the cause. Courts of justice, English courts of justice, (as any English lawyer will be ready to assure you) are always open: but an argument I should not choose to pay for, is an argument on the question whether in this sense a master's office is or is not a court of justice.

In ecclesiastical court procedure again, as in equity procedure, all is darkness: why?—because in those courts of narrow jurisdiction the demand for secrecy is particularly urgent? Not for any such cause, most surely: that cause would be a rational one. It is because this smaller branch, as well as the larger, was

imported ready-grown from the Roman world. In both instances, who were the importers? Men who, whatever was the cause, loved darkness better than light.

Within the jurisdiction of these courts are included causes relative to adultery: and in these causes is not the peace and honour of families concerned? Yes, surely, if in any. Here then at least (it may be added) is not the veil of secrecy well applied? applied fortunately at least, if not wisely?—Yes, verily, if it were applied to any effect: but is it? To the delivery of the evidence the public is not admitted, because it would be against custom and against principle. But the evidence, when delivered, is made public; as public as the press can make it. While concealed, it is not because concealment is favourable to decency: when made public, it is not because publicity is favourable to justice. When concealed, it is not because judges have regard to family peace, to female honour, or to decency; but because judges, or those who act under judges, have a regard for trade. The secrets of the Arches are opened by the same key, the same patent key, by which the courts in Westminster and Guildhall are closed.

There are moral obstacles, and there are physical ones: there are prohibitions, and there are stone walls: the walls are of rather the firmer texture. In the highest criminal court, the King's Bench, when the doors are not shut, the proceedings are said to be public: and when in a popular mood, magnificent are the eulogiums pronounced on the publicity by learned judges. When the doors are not shut, the proceedings

are said to be public : but within these doors, in what numbers it is possible for men to come, or (being come) to hear, is not worth thinking of. When the doors are not shut, the proceedings are said to be public : and so are they when the doors are shut, so long as it is in the power of money to open them. Would you know what becomes of the money ? Ask the door-keeper or the Lord Chief Justice : the door-keeper, who either keeps the money or pays it over ; the judge, who either gives the place or sells it.

So much for that branch of publicity which consists in the admission of spectators into the theatre of justice. Next, as to that which consists in the printed publication of the whole of the proceedings, including at any rate the evidence : publication of the *trial*, as we say in English. In that part of the cause which is called the trial, is contained (with scarce an accidental exception) as much of it as is capable of exciting, on the part of a non-professional reader, the least particle of interest : all the rest of the proceedings being of a nature common to all causes of that class, and not contributing to add to the conception of the characteristic features of the individual cause. In this document are exhibited, 1. the cause of action, as set forth in the declaration or indictment, according as the cause belongs to the non-penal or penal class ; 2. the evidence, as contained in the questions put to the witnesses, whether by advocates, judge, or jurymen, and the answers given in consequence ; 3. the arguments of the advocates on both sides ; 4. the substance of the

evidence, as recapitulated by the judge, with any such observations as he thinks fit to make on it, for the instruction of the jury.

In England, the faculty of printing and publishing the trial as thus explained, is, in the instance of all causes at the hearing of which the public is permitted to be present, open to any person who may find himself disposed to exercise it. It is exercised, as often as (in the instance of a party concerned) the care of his reputation, or (in the instance of a bookseller or reporter) the prospect of profit, presents an adequate inducement: an incident that frequently does happen, and may happen in any case, for any assurance that any person interested in the concealment of improbity or negligence or imbecility could ever give himself to the contrary. In this way, not only the parties to the cause are upon their trial before the bar of the public, but all the other actors in the drama: witnesses, advocates, jurymen, and judges.

The fixation of the evidence in this way by signs of an unevanescent and imperishable nature, affords (it is evident) to the correctness of the expression a much more permanent security than could be afforded by the mere publicity of the transaction—by the faculty afforded to the public at large of catching by the ear such a transient impression as that organ is capable of receiving. Expense apart, the thing to be desired would be, that such complete publication should take place in every case. In the bulk of cases, the magnitude of the expense operates as a bar: but, by a happy coincidence, the more important the cause, the better the chance it possesses of obtaining this matchless security

for propriety of conduct on the part of all persons in any way concerned in it.

In this country, an account more or less particular of the proceedings of the principal courts of justice, has, for many years past, formed a constant ingredient in the composition of a newspaper. The degree of interest likely to be taken by the public, is in this case the natural measure of the space allowed to the history of each cause. Wherever, according to the calculation made by commercial speculation, the degree of interest promises to spread to a certain extent, the history of each cause forms a separate publication.

The causes which serve to hold up to the view of the public the conduct of the public functionaries, are among those by which the most extensive interest will naturally be excited.

Thus intimate is the connection between intelligence, curiosity, opulence, morality, liberty, and justice.

Another advantage of this publicity, and one that applies more directly to the present head, is the chance it affords to justice of receiving, from hands individually unknown, ulterior evidence; for the supply of any deficiency, or confutation of any falsehood, which inadvertency or mendacity may have left or introduced. In this way, though it furnishes not altogether the same inducement, (the motive grounded on the religious sanction), it may be capable of answering in other respects, and (if with less efficacy) on the other hand with less danger, the purpose of the French *Monitoire*.

Such might be the use made of it: and by this means, in penal causes of the two highest

classes, a powerful barrier might be erected against the influx of that most copious of all causes of mendacity and consequent impunity, *alibi* evidence. But as matters stand at present, the rule which forbids *new trial*\* in this the most

\* In English criminal law, two opposite, but alike baneful, principles,—one of thoughtless cruelty, the other of equally thoughtless laxity,—are constantly at work together: the one infusing its poison into legislation, the other into judicature: the one inimical to all enlightened policy, the other to all substantial justice.

By the one,—at the suggestion of some individual member of the legislature, engrossed by the view of some narrow object, without so much as a thought about any that are on one side of it,—penal laws are heaped upon penal laws, in a progression the ultimate tendency of which is to extend to all cases a mode of punishment too radically incongruous to be fit to be employed in any. Between delinquency and punishment, between temptation and check, between impelling causes and restraining causes, between delinquency and delinquency, between mischief and mischief,—on these and the like occasions, not the faintest idea of proportion seems ever to have made its way into those seats of public sapience. In this state of things, if a mark which is never aimed at should not unfrequently be missed, the wonder will not be great.

The other principle is employed, in the hands of the judge, to frustrate the laws altogether, by preventing them from being executed; it is the principle which will be so often spoken of in this work, under the name of the principle of nullification; and its instruments are quirks, or (as they are generally called) decisions on grounds foreign to the merits.

Each, as if by consent, with blind and wayward industry, tampers in his own way with the cords that bind society together: the legislator in straining them, the judge in fretting and enfeebling them: and the farther the advance made in the system of indiscriminating tension, the stronger the passion, and the more plausible the pretence, for equally indiscriminating and still more extensive relaxation. The two functionaries, playing a seemingly adverse part, each in pursuit of his own narrow and sinister interest, play in fact (with or without thinking of it) into each other's hands. The one obtains the praise of wisdom, by the sacrifice of all enlarged

important class of causes, prevents the application of the principle to this use,—prevents the deriving of any advantage to justice from this

and consistent policy; the other the praise of humanity and science, and at no greater expense than the sacrifice of the interests of truth and justice and public security.

Partly to this desire of ill-earned popularity, partly to the habit of blind adherence to blindly established rules, may be ascribed the maxim which declares that, when the proceedings of one trial have not been sufficient to warrant the conviction of a prisoner, there shall never be another. If neither truth nor justice were of any value, there would be no objection to this rule: but, supposing either to be worth caring for, the mischievousness as well as absurdity of it will be equally incontestable.

Completeness of the mass of evidence is a point no less essential than correctness. It is accordingly an object at which, by cross-examination and a variety of other means, English procedure never ceases to aim; except in so far as its endeavours are stopped and diverted by some blind and sinister prejudice. In cases not penal (except as excepted—for in English jurisprudence no general proposition is true till after an indeterminable list of exceptions has been taken out of it);—in cases not penal, to whichever side the result of one trial has been favourable, the door is open to another. In criminal cases, no: this must not be: if a guilty man has in this way been let loose, there is no harm done: so he might have been by a thousand other causes, none of them having, or so much as professing to have, any regard or relation to the merits. If a man not guilty has been convicted,—no, not then neither: he is to be saved or not, as he can find favour: the credit of saving him is to be taken out of the hands of open and discerning justice, and made a perquisite of, for the benefit of secret yet ostentatious mercy. As if every praise bestowed on mercy were not purloined from justice: as if the very distinction between justice and mercy had anything but blindness and weakness for its source: as if such mercy were anything better than tyranny, with hypocrisy for a covering to it.

The ways in which justice may be, and every day is, knocked on the head by the instrumentality of this rule, are infinite. Papers for the moment put out of the way: witnesses locked up, kept in a state of drunkenness, sent away

source. To point out a remedy for that mischief, and (what is of much more difficulty) to enquire whether the remedy, which is obvious

on fool's errands, or misinformed as to the appointed day or hour: and so forth.

Two sorts of occasions alone shall here be brought to view in any detail; partly on account of the frequency of their occurrence, partly on account of the facility, as well as imperative propriety, of obviating them. One is the case of *character* evidence: an article to be hereinafter spoken of in the character of a species of circumstantial evidence. The inconclusiveness of it in some cases, the importance of it in others, will be fully brought to view. The circumstance which calls for the mention of it for the present purpose, is the encouragement afforded to mendacious evidence of this description by the adherence to the above blind rule. A good character is given to a guilty defendant by accomplices, whose character, being inscrutable, must be taken for good. The defendant is a thief; and the receivers, who are his customers, come with a panegyric on his honesty. What risk is encountered by such evidence? what door is left open for the detection of it—especially at the only period when detection would come in time? To both questions the answer is in the negative. To the purpose of the conviction of the guilty principal,—after the verdict by which he stands acquitted, the clearest proof of the worthlessness of the eulogist, the accomplice, would come too late. As to punishment for this species of mendacious testimony, it is, at any rate, without example. To convict a man of mendacity, for an opinion (however false) delivered in general terms,—to warrant on the part of the judge a persuasion adequate to that purpose,—is not in itself an easy task.

The other case is that of *alibi* evidence (as above). Here, the evidence being in its nature so much—the more conclusive, the mischievousness of the factitious bar opposed to the proof of its falsity (where it happens to be false) is the more serious and the more palpable. Conviction, as for the mendacity, would here indeed, in the nature of the case, be as easy and comparatively certain (understand always in case of prosecution), as in the other it is difficult and precarious. But, for the vexation and expense of prosecuting for this execrable crime, who is there that shall find adequate motives? Neither public spirit, nor even vengeance, are in

enough, would be worth the purchase,—belongs to another Book.\*

Such as our exigencies are, such is our nomenclature. For alibi evidence, a branch of perjury springing out of English procedure, English jurisprudence, and that alone, affords a familiar name. At the expense of delay, which, in the system of Roman procedure, has no bounds, that system frees itself from this source of undue acquittal and impunity. Were a guilty defendant to attempt to prove the impossibility of his crime by his distance from the spot, the prosecutor, convinced of the falsity of this evi-

general found equal to such a task. A prosecution of this sort, is, if not altogether without example, extremely rare; while, unhappily, nothing is more common than the offence.

Mean time, although punishment as for the perjury were actually to take place, the conviction of the criminal in whose favour it was uttered, and by whom or in whose behalf it was suborned, would be never the nearer. Had the crime been a non-penal one, and the matter in dispute some petty right of property, yes: but upon a criminal, the laws are to go unexecuted, rather than that, to the two superfluous enquiries that have been seen, a necessary one should require to be superadded.

In regard to remedies, two, equally obvious, present themselves; each alike applicable to both these species of circumstantial evidence.

One is,—in case of the acquittal of a prisoner on the ground of such evidence, the rendering the acquittal provisional:—reversible on subsequent proof of falsehood on the part of the evidence. The other is, the requiring (according to a practice already established in some cases) timely notice to be given of the nature of the evidence so intended to be produced, and of the persons of whose testimony it is to consist. As to the combination of these two securities, or the option to be made between them, these are among the topics which belong not to *evidence*, but to *procedure*.

\* Book V. CIRCUMSTANTIAL. Chapter 16. *Improbability and Impossibility*. Section 11, *Alibi Evidence*.

dence by the true evidence which it contradicts, would not fail either to demand or to obtain the time requisite for the confutation of it.

In France, even under the *ancien régime*, a custom prevailed which could not but have operated in a very considerable degree as a succedaneum to the constant publicity and frequent publication of the English trials. I mean that of printing *Mémoires* in every stage of a cause, and even before the commencement of it: *mémoires* by or on behalf of the parties, for the purpose of explaining to the body of the public the grounds of their several pretensions. If, at the time of the publication of a *mémoire* of this sort, a decision had already been given by a court of the first instance, the evidence would of course be exhibited and commented upon: and by this means, supposing *mémoires* published on both sides (as would naturally be the case), the effect, and in some respects more than the effect, of an English trial, would be produced. Supposing even the publication of the *mémoire* antecedent to the commencement of the cause, the attention of the public would at any rate be drawn to it, and a guard be thus set upon the probity of the judge.

A circumstance that rendered the demand for this guard more particularly urgent, was the practice of *solicitation*: a practice not only tolerated, but in a manner necessitated: by which was meant that of paying a visit to the judge, out of court and in secret, to endeavour to obtain his favour, and beg his vote and interest in favour of the solicitant or his friend. Money, or anything to be bought for money, was not to be offered: but neither sex was ex-

cluded, either by law or custom: and the advantage afforded by beauty on such occasions was too palpable to be neglected, and too notorious to be denied. The other circumstances contributed to enhance the mischief: the tumultuous multitude of the judges, a circumstance by which the idea of individual responsibility was in a manner obliterated; the common interest possessed by the judges of a superior court, as members of a political body; and the constitution of the state, which exempted them from any such prosecutions as that which, under the name of impeachment, English judges are exposed to undergo, at the instance of one of the three branches of the sovereign body, with the members of the others for their judges.

In England, if a man who had a cause depending before a judge should have the option forced upon him, either to spit in the judge's face, or to wait upon him to solicit him in the *ci-devant* French stile, he would probably choose the first mode of helping his cause as the least dangerous of the two. I can speak only from conjecture: for, as both compliments are equally unexampled, it is impossible to speak from experience.

In England, publications of the cases of litigant parties are altogether unusual, and, if distributed for any such purpose as that of influencing the decision of the jury, would be liable to be treated on the footing of an offence against justice. The censure thus passed upon the practice in England is grounded on reasons which pass no condemnation on the practice just described as prevailing formerly in France.

1. In the first place, in England there is no

such demand and use for it as that which has already been exhibited as resulting from it in France. No solicitations: judges acting singly, whose conduct, without the need of any such occasional lights, is transparent on every occasion and on every point.

2. In England, the ground for the prohibition put upon these *ex parte* publications, is the danger of their exercising an undue influence on the minds of the jury. This reason, whatsoever may be the force of it, had no application to the judicial establishment as constituted in France. On professional and cultivated minds, engaged by the necessity of office to procure the whole mass of evidence and argument, the premature exhibition of a part would rather be turned aside from as useless, than apprehended by anybody as dangerous. It was to the eye of the public at large, and not to the eye of any person whose office called on him to act in the character of a judge, that these statements were addressed. In what way could the probity of the judge be endangered by receiving at one time a part of those documents, the whole of which would come before him of course? Even in England, the reason on which the prohibition relies for its support has more of surface than of substance in it. The representations given by publications of this sort will of course be partial ones: the colour given to them will be apt to be inflammatory: the judgment of a jury will be apt to be deceived, and their affections engaged on the wrong side. Partial? yes: but can anything in these printed arguments be more partial than the *viva voce* oratory of the advocates on that

same side will be sure to be? The dead letter cannot avoid allowing full time for reflection: the *viva voce* declamation allows of none. The written argument may contain allegations without proofs: true: but is not the spoken argument just as apt to do the same? When, of the previous statement given by the leading advocate, any part remains unsupported by evidence, the judge of course points out the failure: whatever effect this indication has on the jury, in the way of guarding them against that source of delusion in spoken arguments, would it have less efficacy in the case of written ones?

END OF THE FIRST VOLUME.

## ERRATA ET CORRIGENDA TO VOLUME I.

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PAGE      LINE

- 1 — 6 after *The* insert *main*.  
1 — 6 for *three* put *four*.  
1 — 8 for *two* put *three*.  
1 — 20 for *three* put *four*.  
1 — 20 after *result*, insert the following paragraph :—  
    To give instructions, pointing out the means, by which, of such masses or articles of evidence as each case may require, the *existence* and *forthcomingness* may most effectually be secured. To secure its *existence* is (it will be seen) in a more particular manner, the work of the legislator: to wit, by means of arrangements of a *general* nature: as to which see what is said under the head of *pre-appointed evidence*: to secure its *forthcomingness*, under the direction of the legislator, is the work of a judge, operating towards that end in each individual case: in this may be seen one of the main problems, the solution of which is here attempted.  
1 — 23 after *truth*, insert *or say the trustworthiness*.  
1 — 23 for *one* put *another*.  
1 — 24 for *two* put *three*.  
2 — 1 for *second* put *third*.  
2 — 7 for *the other* put *another*.  
2 — 8 for *two* put *three*.  
2 — 10 for *third* put *fourth*; for *three* put *four*.  
23 — 3 after *The class* dele to line 12—*be crushed*.  
26 — 17 for *compensation* put *satisfaction*.  
32 — 26 for *either* put *each*.  
33 — 25 for *form* put *force*.  
34 — 12 after the word *end* insert \*, and at bottom, in form of a note:—Evils opposite to rectitude of decision are, 1. Misdecision; 2. Non-decision. Correspondent to these evils are so many branches of the direct end, which may accordingly be termed each of them a direct end, making two instead of one.

- PAGE LINE
- 36 — 31 after *evidence* insert \*, and at bottom a note in these words:—It belongs to substantive law; though by judges, its makers, the matter in question is, on the occasion in question, presented to view as if it belonged to procedure—that is to say, to adjective law. See a note on this subject by the Editor in another volume, as per index.
- 45 — 29 for *to have put as having*.
- 45 — 35 for *to have put as having*.
- 47 — 11 for &c. put 6 *Motives*: that is to say, desires; or say, ideas of pleasures or pains, considered as giving birth to volitions, and thence to physical facts. For an enumeration of seventeen distinguishable psychologal facts, see *Chrestomathia*. II. 143.
- 48 — 29 for *relative position* put *position relative*.
- 52 — 21 after *question* insert or in the state, real or supposed, of this or that object belonging to the class of things.
- 52 — 22 before *The* insert *Where the object belongs to the class of persons*.
- 53 — 24 insert *written evidence*, which is personal, delivered through the medium of real. Under the name of quasi-written, include discourse designated by permanent signs, brought into existence by operations any other than that of writing: such as printing, engraving, painting, &c.
- 62 — 1 for *by* put *from*.
- 67 — 4 for *by* put *from*.
- 96 — 14 for *trustworthy* put *untrustworthy*, so it be not incredible.
- 97 — 16 after *all* insert *being*.
- 98 — 14 for *the* put *that same*.
- 103 — 7 for *be destroyed* put *not be increased*.
- 120 — 11 after *end*, insert *On this supposition*.
- 127 — line the last, add—*As to this, see Introduction to Morals and Legislation, Chap. II.*
- 148 — after *coin* insert or *matters employed as substitutes to it*.
- 152 — 16 after *indifference* insert *sinister interest*.
- 154 — 35 before *The* insert *To the present purpose*.
- 191 — line the last, add—and *Table of Springs of Action*.
- 203 — 19 before *mendacity* insert *on the sort of occasion in question*.
- 268 — 39 in *non-litigant* delete *non*.
- 274 — 4 after *each* insert *of*.

PAGE	LINK
298	— 24 dele word, whether this.
302	— 7 for insecurity put in security
307	— 32 after or put if.
329	— 7 for way put case.
333	— 7 for the put this.
342	— 21 before testimonial put the.
354	— 8 after dissolved put than.
362	— 1 for him put it : line 3 for him put it.
381	— 29 for of put those who occupy.
404	— 19 for nor put not.
406	— 14 after render insert the propriety of it.
455	— line the last, after word insert a colon.
464	— 27 for cause put ends.
481	— 24 after interrogation insert being such that.
481	— 25 dele that.
484	— 28 for of difficult put difficult of.
498	— 1 dele And.
518	— 20 for exemptions put exemplars.
518	— 23 for exemption put exemplar.
520	— 18 for are put may be.
536	— 31 for a principle put an instrument.
542	— 6 before Purpose put Object, or say ; and for 2 put 1.
542	— 5 after evidence insert Of each of these objects separately.

